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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1997

AT&T CORP., *et al.*,
*Petitioners,*
v.
IOWA UTILITIES BOARD, *et al.*,
*Respondents.*

AT&T CORP., *et al.*,
*Petitioners,*
v.
PEOPLE OF THE STATE OF CALIFORNIA, *et al.*,
*Respondents.*

AND RELATED CASES

**On Writs of Certiorari to the United States Court of Appeals for the Eighth Circuit**

## BRIEF OF BELL ATLANTIC CORPORATION, BELLSOUTH CORPORATION, AND SBC COMMUNICATIONS INC.

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## QUESTIONS PRESENTED

1. Whether the Communications Act of 1934, as amended—which gives States sole authority to "establish" and "determine" just and reasonable rates for local interconnection arrangements (47 U.S.C. § 252(c), (d)) and which provides that "nothing in this Act shall be construed . . . to give the [Federal Communications] Commission jurisdiction" with respect to intrastate matters (*id.* § 152(b))—forecloses the FCC's assertion of preemptive jurisdiction to regulate the rates and certain other terms of local interconnection arrangements.

2. Whether FCC rules requiring incumbent telephone companies to provide their competitors with preassembled combinations of "unbundled network elements" conflict with statutory text stating that unbundled network elements need only be provided "in a manner that allows *requesting carriers* to combine such elements" (47 U.S.C. § 251(c)(3) (emphasis added)).

3. Whether FCC rules requiring incumbents to provide their competitors, in fully preassembled form and at cost-based rates, a "platform" of all the network elements needed to duplicate the incumbent's finished telecommunications service violate the wholesale pricing requirements and marketing restrictions governing a competitor's resale of the incumbent's telecommunications services (47 U.S.C. §§ 252(d)(3), 271(e)(1)).

4. Whether the FCC improperly expanded an incumbent's obligation to provide access to essential "network elements" (a) by ignoring the statute's threshold requirement that access to network elements is required only when such access is "necessary" or when the incumbent's failure to provide such access would "impair" a competitor's ability to provide service (47 U.S.C. § 251(d)(2)), and (b) by expanding the definition of "network element" (*id.* § 153(29)) to include assets extrinsic to an incum-

bent's transmission network and complete telecommunications services that incumbents offer at retail.

5. Whether FCC rules allowing a competitor to force upon an incumbent carrier any isolated provision from any of the incumbent's approved interconnection agreements conflicts with the Act's reliance on private negotiations and binding agreements and with statutory text providing that an incumbent carrier must make such provisions available to other carriers only "upon the same terms and conditions" as in the original agreement (47 U.S.C. § 252(i)).

## LIST OF PARTIES AND AFFILIATES

Pursuant to Supreme Court Rule 29.6, the parties to this brief submit the following statement concerning parent companies and non-wholly owned subsidiaries:

Bell Atlantic Corporation has no parent companies. It owns the following subsidiaries having securities in the hands of the public: Bell Atlantic-Delaware, Inc., Bell Atlantic-Maryland, Inc., Bell Atlantic-New Jersey, Inc., Bell Atlantic-Pennsylvania, Inc., Bell Atlantic-Virginia, Inc., Bell Atlantic-Washington, D.C., Inc., Bell Atlantic-West Virginia, Inc., Bell Atlantic Financial Services, Inc., NYNEX Corporation, New York Telephone Company, New England Telephone and Telegraph Company, Bell Atlantic Credit Corporation, and Bell Atlantic Global Funding Corporation. In addition Bell Atlantic has the following non-wholly owned subsidiaries: One Parkway, Inc., ICA Foreign Financial, Inc., Chesapeake Directory Sales Company, Atlantic West B.V., Grupo Iusacell, S.A. de C.V., Bell Atlantic New Zealand Holdings, Inc., PrimeCo Personal Communications, L.P., Washington, D.C. SMSA Limited Partnership, New York SMSA Limited Partnership, Upstate Cellular Network, Orange County Poughkeepsie MSA Limited Partnership, Pittsfield Cellular Telephone Company, Allentown SMSA Limited Partnership, Reading SMSA Limited Partnership, Pittsburgh SMSA Limited Partnership, Pennsylvania RSA No. 6(II) Limited Partnership, Columbia Cellular Telephone Company, Anderson Cellular Telephone Company, Las Cruces Cellular Telephone Company, TELE-TV, TELE-TV Media, L.P., TELE-TV Systems, L.P., NYNEX Master Lease Partners, Global Directory Services Company, MEDIATEL spol. s.r.o., Bell Atlantic Information Services Hellas S.A., Polskie Ksiazki Telefoniczne Sp. z o. o., Nord Trans Biuro Reklam Sp. z o. o., NYNEX Worldwide Directories Company, Kipling Associates L.L.C., NYNEX International (Asia) Ltd., and Gibraltar NYNEX Communications Limited.

BellSouth Corporation has no parent companies. BellSouth Corporation's non-wholly owned subsidiaries are 1155 Peachtree Associates, BellSouth New Zealand, Compania de Radiocomunicaciones Moviles S.A., Telcel Celular C.A., Tele 2000, S.A., BellSouth Wireless Data, L.P., RAM Mobile Data Belgium, S.C.S., RAM Mobile Data C.V., BellSouth Carolinas PCS, L.P. (d/b/a BellSouth Mobility DCS in NC & SC), Bloomington Cellular Telephone Company, Chattanooga MSA Limited Partnership, Decatur RSA Limited Partnership, Florida RSA #2B (Indian River) Limited Partnership, Georgia RSA No. 1 Limited Partnership, Georgia RSA No. 2 Limited Partnership, Georgia RSA No. 3 Limited Partnership, Gulf Coast Cellular Telephone Company, Jacksonville MSA Limited Partnership, Lafayette MSA Limited Partnership, Los Angeles Cellular Telephone Company, Louisiana RSA No. 7 Cellular General Partnership, MCTA, Memphis SMSA Limited Partnership, Muncie Cellular Telephone Company, Inc., Orlando SMSA Limited Partnership, Richmond Cellular Telephone Company, Tennessee RSA Limited Partnership, and Terre Haute Cellular Telephone Company, Inc.

SBC Communications Inc., which has shares outstanding in the hands of the public, is the parent company of Southwestern Bell Telephone Company and Southwestern Bell Yellow Pages, Inc. SBC Communications Inc. has the following non-wholly owned subsidiaries which have shares or partnership interests outstanding in the hands of the public: Abilene SMSA Limited Partnership, Amarillo SMSA Limited Partnership, Buffalo Telephone Company, Cellular Mobile Corporation, Champaign CellTelco, Dallas SMSA Limited Partnership, Decatur Cellular Telephone Company, Inc., Eastern Missouri Cellular Limited Partnership, Gainesville Development Associates Limited, Gary Cellular Telephone Company, Kansas City SMSA Limited Partnership, Lubbock SMSA Limited Partnership, McAllen/Edinburgh SMSA Limited

Partnership, Midland-Odessa SMSA Limited Partnership, Missouri RSA 8 Limited Partnership, Missouri RSA 9 B1 Limited Partnership, Oklahoma City SMSA Limited Partnership, Oklahoma RSA 3 Limited Partnership, Oklahoma RSA 9 Limited Partnership, PTF/FCLC Associates (LP), PTF/GECC (California) Associates (LP), San Antonio SMSA Limited Partnership, SBMS Cellular Telecommunications Bloomington, Inc., SBMS Cellular Telecommunications Springfield, Inc., S.T.L.M. Programming Services Limited, St. Joseph SMSA Limited Partnership, Texas RSA 9B4 Limited Partnership, Texas RSA 10B1 Limited Partnership, Texas/Illinois Cellular Limited Partnership, Topeka SMSA Limited Partnership, Washington/Baltimore Cellular Limited Partnership, Wichita SMSA Limited Partnership, and Worcester Telephone Company.

On April 1, 1997, SBC Communications Inc., Pacific Telesis Group ("PAC"), and SBC Communications (NV) Inc., a wholly owned subsidiary of SBC Communications Inc., completed an agreement and plan of merger by the means of which PAC and SBC Communications (NV) Inc. were merged into PAC, and PAC became a wholly owned subsidiary of SBC Communications Inc. PAC, formerly a publicly held corporation, and its wholly owned subsidiaries, Pacific Bell and Nevada Bell, provide telecommunications services subject to the general jurisdiction of the Federal Communications Commission.

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## BRIEF OF BELL ATLANTIC CORPORATION, BELLSOUTH CORPORATION, AND SBC COMMUNICATIONS INC.

---

## STATEMENT OF THE CASE

This case presents two sets of questions triggered by the FCC's misguided attempt to reconfigure the Telecommunications Act of 1996 (the "1996 Act").[1]

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[1] Relevant provisions of the Communications Act of 1934, as amended by the Telecommunications Act of 1996, are set forth in the addendum to this brief.

First, breaching a 60-year old statutory barrier that Congress had purposely left in place, the Commission asserted authority to superintend nearly every aspect of competition in local telephone markets—including, in particular, the prices that incumbent local carriers may charge their competitors for access to local networks. The FCC made that unprecedented claim despite Congress's express directive that "State commissions," not the FCC, shall "establish" and "determine" the relevant prices according to standards set forth in the 1996 Act itself (47 U.S.C. § 252(c) and (d)); despite the FCC's frank admission that the new statute "do[es] not contain an explicit grant of intrastate authority to the Commission" (J.A. 448 (¶ 84)); and despite the deeply rooted principle that only the most direct and unambiguous statutory language can override the Communications Act's express prohibition against any such FCC assertion of intrastate jurisdiction.

Second, the FCC's substantive rules effectively nullified the Act's fundamental distinction between two discrete paths by which a competitor may enter local service: leasing unbundled portions of an incumbent carrier's local network at cost-based rates, and purchasing for resale a finished telecommunications service at the incumbent's retail rate less a wholesale discount. The FCC sanctioned a scheme of sham unbundling, under which a competitor could purchase a finished service for resale, *not* at the wholesale discount specified in the Act, but at the cost-based price reserved for unbundled network elements. The competitor could do so merely by relabeling its request for the incumbent's finished service as a request for a fully preassembled package of all the elements of an incumbent's network needed to provide the identical finished service that the incumbent itself provides. That result not only destroyed the statutory distinction between resale and unbundled network elements, but also subverted the important goal of preserving universal telephone service. Regulators require incumbent carriers to keep their

rates for local residential service artificially low and allow them to recover their losses elsewhere. If new entrants could obtain at cost-based rates the services that incumbents necessarily provide above cost, they could cherry-pick the incumbent's profitable customers, leaving the incumbent with no way to recover its losses on basic residential service.

**1. Background.** For over 60 years, since the enactment of the Communications Act of 1934, Congress has expressly confined the FCC's jurisdiction to interstate and foreign communications and has reserved for the States exclusive jurisdiction over intrastate communications. Section 2(b) of the Act provides (with exceptions not relevant here) that "*nothing* in this [Act] shall be construed to apply *or to give the Commission jurisdiction* with respect to . . . charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier." 47 U.S.C. § 152(b) (emphasis added). This Court has squarely held that section 2(b) "fence[s] off from FCC reach or regulation intrastate matters," and that only an "unambiguous" and "straightforward" grant of specific intrastate jurisdiction to the FCC can "override the command of [§ 2(b)]." *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 370, 377 (1986).

Until recently, most States exercised their federally guaranteed authority over local telephone service by granting exclusive franchises in each local service area and pervasively regulating these franchised "local exchange carriers" (or "LECs") with an eye to securing affordable "universal service." To keep prices low even for high-cost customers, the States mandated an extensive system of interservice subsidies under which LECs were typically required to charge below-cost rates for basic residential service and above-cost rates for business and other services. The level and structure of these subsidies naturally varied throughout the country depending on each State's local conditions and prevailing social policies.

Interservice subsidy arrangements were economically sustainable only because the States preserved certain legal barriers to entry that prevented competitors from cherry-picking LEC business customers whose above-cost rates fund universal service. In the years leading up to the 1996 Act, however, a number of States began to depart from the exclusive franchise model. These States took the lead in the difficult and inherently localized process of opening up local telephone markets to competition while still ensuring affordable, high-quality service to all consumers. *See* J.A. 241 (*Iowa Utils. Bd. v. FCC*, 109 F.3d 418, 427 n.7 (8th Cir. 1996)).

**2. The 1996 Act.** Building significantly on the work already done by the States, Congress crafted in the 1996 Act a "pro-competitive, de-regulatory national policy framework" designed to "open[] all telecommunications markets to competition." S. Conf. Rep. No. 104-230, at 113 (1996) ("Conf. Rep."). With respect to local service markets, Congress expressly preempted all State and local legal barriers to entry, such as exclusive franchises. *See* 47 U.S.C. § 253(a).

Congress also imposed on incumbent local exchange carriers several affirmative duties. First, an incumbent carrier must allow competitors to interconnect with the incumbent's network in order to complete calls to and from that network. *Id.* § 251(c)(2). Second, an incumbent must sell competitors access to "network elements" on an "unbundled basis"—that is, allow competitors to supplement their own network facilities by leasing individual pieces of "equipment" or a "facility" from the incumbent's transmission network. *Id.* § 251(c)(3); *see also id.* §153(29). Third, an incumbent must sell competitors its retail telephone services at wholesale prices so that competitors can resell those complete, finished services to their own customers. *Id.* § 251(c)(4). These duties ensure that, instead of having to build a complete network from scratch before entering the local market, a com-

petitor will be able to enter gradually by leasing individual facilities to fill in gaps in its own network or by reselling the incumbent's existing services.

Recognizing, however, that these steps implicated the intensely local concerns of 50 different jurisdictions—each with its own system of rate structures, regulations, and subsidies—Congress enlisted the State public utility commissions to ensure that local competition would be implemented fairly and with due regard to local conditions. In keeping with its deregulatory purposes, Congress chose to rely in the first instance on private party negotiations to reach interconnection agreements consistent with the 1996 Act.[2] But where the parties cannot agree on all issues within a prescribed bargaining period, Congress provided that either party may petition the State commission "to arbitrate any open issues." 47 U.S.C. § 252(b)(1). Most significantly for present purposes, the Act entrusts solely to State commissions the resolution of disputes concerning the crucial question of pricing. It provides that "*a State commission* shall . . . establish any rates for interconnection, services, or network elements," in accordance with the pricing standards spelled out in the statute. *Id.* § 252(c)(2) (emphasis added); *see also id.* § 252(d)(1) (specifying that "a State commission" shall "determin[e]" just and reasonable rates).

Congress provided for ultimate federal oversight of State arbitrations, but it chose a judicial, not an administrative, mechanism for this oversight. Once an arbitrated agreement has been finally approved by a State commission, any aggrieved party may bring an action in federal district court to determine whether the decision

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[2] Incumbent carriers have signed more than 2,400 voluntary agreements with 280 local service competitors. *See* Roy Neel, President, United States Telephone Association, En Banc Presentation on Local Competition before the FCC, Jan. 29, 1998; USTA Competition Report (Nov. 3, 1997).

"meets the requirements of section 251 . . . and [section 252]." *Id.* § 252(e)(6).

In contrast to its broad reliance on private negotiations, State-supervised arbitrations, and federal judicial review, Congress assigned the FCC a limited role under the Act's local competition provisions. The statute provides that, if a State commission actually declines to carry out its responsibilities under section 252, the FCC "shall assume the responsibility of the State commission . . . with respect to the proceeding or matter." *Id.* § 252(e)(5). Otherwise, with a few specifically stated exceptions,[8] Congress scrupulously avoided authorizing the FCC to intrude on the States' jurisdiction to oversee intrastate telephone service. In particular, while directing the FCC to issue within six months regulations implementing the provisions for which it was assigned specific responsibility (*id.* § 251(d)(1)), Congress gave the FCC *no* role with respect to the pricing of interconnection arrangements.

**3. The FCC's Order.** Unwilling to accept its circumscribed role under the new statute, the FCC moved aggressively to transform the deregulatory, State-centered plan Congress enacted into a massive new federal regulatory program. In its First Report and Order—a 700-page, 3,200-footnote opus—the Commission undertook to promulgate "uniform, national rules" addressing every conceivable local interconnection issue (J.A. 431 (¶ 53)), and it declared those rules "binding on the states, even with respect to intrastate issues" (*id.* at 455 (¶ 101)).

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[8] For example, Congress gave the FCC "exclusive jurisdiction" over the administration of "telecommunications numbering," including the responsibility to make numbers available "on an equitable basis." 47 U.S.C. § 251(e)(1). It also gave the FCC a role in defining a carrier's duty to provide "number portability" (*id.* § 251(b)(2)); in determining what network elements should be unbundled (*id.* § 251(d)(2)); in prescribing permissible resale restrictions (*id.* § 251(c)(4)(B)); and in providing for the treatment of comparable carriers as "incumbents" (*id.* § 251(h)(2)).

Although the FCC conceded that the 1996 Act "do[es] not contain an explicit grant of intrastate authority to the Commission" (*id.* at 448 (¶ 84)), it nevertheless proclaimed that it had authority "without limitation" (*id.* at 463-64 (¶ 115)) to issue such binding rules because, in its view, the "1996 Act moves beyond the distinction between interstate and intrastate matters that was established in the 1934 Act" (*id.* at 417 (¶ 24)). As the FCC's Chairman declared in plainer terms, the 1996 Act threw the States' traditional intrastate authority into "the trash can of history."[4]

Having asserted unconstrained intrastate authority, the FCC turned its attention to the pricing of local interconnection arrangements. Even though section 252(d) expressly assigns to "State commission[s]" the authority to determine "just and reasonable" rates, the FCC declared that Congress intended the *federal* agency to take the lead role in implementing the statutory pricing provisions. Divining a jurisdictional dichotomy nowhere expressed in the statutory text, the Commission asserted jurisdiction to adopt "national pricing rules" and to relegate the States to the subordinate and largely ministerial role of mechanically applying those rules. J.A. 448-49, 461-62 (¶¶ 85, 111).

In particular, the Commission mandated a new pricing methodology known as "total element long run incremental cost" (or "TELRIC"), which required States to set prices based solely on the incremental, forward-looking cost of an ideally efficient network—a hypothetical network that, by design, ignored nearly every aspect of an incumbent's actual current "cost . . . of providing the interconnection or network element" (47 U.S.C. § 252(d)(1)). *See* J.A. 419 (¶ 29). The FCC then defined in elaborate detail the steps that State commissions must take

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[4] *Hundt Looks toward 'Radical' Overhaul of Regulatory Regimes, Major Business Moves*, Telecommunications Reports, at 6 (July 15, 1996).

to adhere to the TELRIC standard. *See, e.g.*, J.A. 751-69 (¶¶ 672-715); 47 C.F.R. §§ 51.501 *et seq.* The Commission further specified the result that States must reach as to every other pricing issue of consequence, from the extent of geographical rate "deaveraging" (at least three different rate zones in each State) to the appropriate divisions between recurring and non-recurring charges. *See* 47 C.F.R. §§ 51.505(b)(3), 51.507(f). The FCC even ordered each State to apply specific FCC-prescribed rates (known as "proxy" prices) until the State could conduct a detailed cost study in compliance with the FCC's newly minted TELRIC methodology. J.A. 419, 790-91 (¶¶ 29, 767-770).[5]

In addition to these intricate pricing rules, the FCC's First Report and Order also contained lengthy and detailed regulations governing non-pricing aspects of the 1996 Act. Of particular importance here, the FCC's order completely dismantled the statute's distinction between access to an incumbent carrier's unbundled network elements—which must be priced at "cost" plus "a reasonable profit" (47 U.S.C. § 252(d)(1))—and the provision of finished services for resale—which must be priced at the incumbent's "retail rates" less "avoided" costs (*id.* § 252(d)(3)). Because States have set above-cost rates for business and advanced services to fund affordable, below-cost service for basic residential service, the retail-less-avoided-cost standard of section 252(d)(3) ensures that the wholesale price paid by a resale competitor reflects the same contribution toward the cost of providing universal service that is contained in

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[5] In a separate order in the same proceeding (J.A. 1161-357 (Second Report and Order)), the FCC also asserted power to dictate to the States the terms and conditions for implementing intrastate "toll" (*i.e.*, short-haul long-distance) "dialing parity"—a system that allows callers to choose a carrier other than their local telephone company for such service without dialing extra digits. *See* 47 U.S.C. §§ 153(15), 251(b)(3). The FCC asserted this power even though Congress directed the States, not the FCC, to implement dialing parity for such intrastate calls. *See id.* § 271(e)(2)(B).

the incumbent's retail rates.[6] By contrast, because regulators generally have refused to consider these interservice subsidies as part of the "cost" of unbundled network elements under section 252(d)(1), the actual prices for network elements provide no support for universal service.

The Commission nonetheless ruled that a competitor could purchase at cost-based rates *all* the elements needed to provide a complete service. And despite the statute's express statement that incumbents need provide access only "in a manner that allows *requesting carriers* to combine such elements" (47 U.S.C. § 251(c)(3) (emphasis added)), the Commission ruled that a competitor could even require the incumbent to provide those elements in *pre-combined, fully bundled form*. J.A. 551-54, 571-76 (¶¶ 292-297, 328-340). The FCC's rules therefore allowed a competitor to obtain a finished service at cost-based, unbundled element rates—thereby negating the statutory pricing structure—merely by framing its request in different terms: instead of requesting the incumbent's retail service for resale at a wholesale discount off the regulated retail rate, the competitor could simply demand, in fully preassembled form and at cost-based prices, all the supposedly "unbundled" network elements needed to provide that same retail service.

The FCC exacerbated the problem by twisting the definition of "network elements" beyond all recognition. In the Commission's view, an incumbent must provide its competitors with access, not only to the essential physical facilities that a competitor might need to fill out its own local network, but also to essentially *all* of the incumbent's assets and operations, including even its back-office support systems and live operators—hardly "network elements" in any common understanding of that term. J.A.

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[6] *See* H.R. Rep. No. 104-204, at 72 (1995) (in recognition of the "pricing structures for telephone exchange service in the State," the resale rate "should reflect whether, and to what extent, the local dialtone service is subsidized by other services").

670, 679-80 (¶¶ 516, 536). The FCC also swept within its definition of unbundled network elements such optional retail services as Caller ID and Call Waiting, which provide significant universal service contributions. Under the Commission's rules they, too, must be offered to competitors at cost-based rates. *See* J.A. 538-39, 612 (¶¶ 263, 413).

In the process, the Commission essentially read out of the statute a restrictive provision directing the FCC to consider, in determining what network elements must be made available, whether lack of access to a particular element would "impair" a competitor's ability to provide telecommunications services and, in the case of proprietary elements, whether such access is "necessary." 47 U.S.C. § 251(d)(2). In the Commission's view, the "necessary" and "impair" standards have nothing to do with whether a requesting carrier can "obtain an element from a source other than the incumbent"; instead, an element qualifies under both standards unless a requesting carrier can offer the same service using other "elements *within an incumbent LEC's network*," without experiencing any decrease in quality or increase in cost. J.A. 547, 548, 549 (¶¶ 283, 285, 287) (emphasis added).

Finally, the FCC transformed the 1996 Act's unexceptional most-favored-nation requirement—under which an incumbent must make available to requesting carriers, "upon the same terms and conditions," any interconnection arrangement contained in an approved agreement (47 U.S.C. § 252(i))—into an extreme "pick-and-choose" rule that subverts voluntary negotiations and undermines binding agreements. Under the FCC's order, a competitor may pluck any isolated provision from an approved agreement and force it upon the incumbent carrier without accepting the other "terms and conditions" negotiated as part of the same agreement. J.A. 1044-46 (¶¶ 1309-1315). A competitor may even unilaterally revise a signed, State-approved agreement by "avail[ing] itself of more advantageous terms and conditions *subsequently* negotiated by

any other carrier." J.A. 1046-47 (¶ 1316) (emphasis added).

**4. The Stay Proceedings.** Numerous parties, including many State commissions and incumbent carriers, petitioned for review of the FCC's order. Those petitions were consolidated in the Eighth Circuit pursuant to 28 U.S.C. § 2112(a)(3).

Because the FCC's arrogation of pricing jurisdiction seemed so clearly to usurp authority that Congress granted to the States, a number of States, as well as some private petitioners, sought an interim stay of the FCC's rules pending judicial review. After full briefing and oral argument, the Eighth Circuit granted the requested stay in October 1996 because of what "appear[ed] to be the rather clear and direct indication [in the statutory text] that the state commissions"—not the FCC—"should establish prices." J.A. 236 (109 F.3d at 424).

The FCC, AT&T, and MCI filed applications to vacate the stay. Justice Thomas denied those applications. 117 S. Ct. 378; 117 S. Ct. 379 (1996). The FCC immediately reapplied to Justice Ginsburg, and AT&T and MCI reapplied to Justice Stevens. The renewed applications were referred to the full Court, which likewise denied them. 117 S. Ct. 429 (1996).

**5. The Decision Below.** After further briefing and oral argument, the court of appeals confirmed its earlier tentative holding that the plain language of section 252(c) and (d) "directly and straightforwardly assigns to the states the authority to set . . . prices." Pet. App. 17a. Those specific congressional directives were entirely sufficient to resolve the issue of pricing jurisdiction. The court made plain, however, that, even if there were "[a]ny ambiguity," it would be resolved against the FCC because of the jurisdictional proscription of section 2(b), as interpreted by this Court in *Louisiana PSC*. Pet. App. at 15a. As the court of appeals explained, "the prices that incumbent local exchange carriers may charge their new competitors for interconnection, unbundled access, and resale . . . qualify as 'charges . . . for or in connection

with intrastate communications service.'" *Id.* at 15a (quoting section 2(b)).[7]

The Eighth Circuit also addressed a lengthy series of non-jurisdictional challenges to the substance of the FCC's rules. First, the court set aside the FCC's "pick-and-choose" rule because, contrary to the Act's terms and structure, it "would thwart the negotiation process and preclude the attainment of binding negotiated agreements." Pet. App. 26a. The court then turned to the various issues concerning unbundled network elements. It denied challenges to both the FCC's all-encompassing definition of "network element[s]" and its lax understanding of the "necessary" and "impair" standards. *Id.* at 41a-45a, 47a-50a. The court ruled, however, that the FCC's attempt to collapse the fundamental statutory distinction between resale and access to unbundled elements conflicted with both the language and the structure of the Act.

In particular, the court concluded that "the FCC's rule requiring incumbent LECs, rather than the requesting carriers, to recombine network elements that are purchased . . . on an unbundled basis . . . cannot be squared with the terms of subsection 251(c)(3)" (*id.* at 52a), which states that "requesting carriers" are to "combine such elements" to provide telecommunications services. In light of that holding, the court concurrently rejected the incumbents' contention that new entrants cannot obtain access to all of the network elements that, when combined by the requesting carrier, are sufficient to provide service. *Id.* at 54a-58a. Because entrants must

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[7] In a separate appeal that was briefed and argued independently of the main appeal and that the court decided in a separate opinion, the Eighth Circuit concluded that the FCC lacked jurisdiction to issue mandatory rules governing the States' implementation of "intraLATA toll [*i.e.*, short-haul long-distance] dialing parity." Pet. App. 81a-89a. The court of appeals relied on the express terms of section 271(e)(2)(B)—which "indicates that state commissions, not the FCC, have the authority to issue intraLATA dialing parity rules" (Pet. App. 88a)—as well as on this Court's analysis of section 2(b) in *Louisiana PSC*.

make an "up-front investment" and incur additional "costs and risks" in combining the elements themselves, the Eighth Circuit reasoned, recombining all the elements needed to provide a complete service would not simply be resale under another name. *Id.* at 56a-57a.

AT&T and others immediately sought to sidestep the Eighth Circuit's ruling on the issue of combining network elements. Citing the court's failure to vacate a particular subsection of the FCC's rules (47 C.F.R. § 51.315(b))—which provided that, "[e]xcept upon request, an incumbent [carrier] shall not separate requested network elements that the incumbent [carrier] currently combines" (Pet. App. 294a)—AT&T argued in proceedings around the country that it could still skirt the resale pricing rules by obtaining at cost-based prices a "platform" of all the necessary network elements already combined into a complete service by the incumbent.

Once it was alerted to these attempted evasions of its ruling, the Eighth Circuit granted rehearing and vacated the FCC rule at issue as inconsistent with the plain statutory text. The court stated that "§ 251(c)(3) does not permit a new entrant to purchase the incumbent [carrier's] assembled platform(s) of combined network elements"; indeed, if that were allowed, it would "obliterate the careful distinctions Congress has drawn" between resale and unbundled elements. Pet. App. 71a.

## SUMMARY OF ARGUMENT

**I.** Despite the tortuous complexity of the FCC's regulations, the primary legal issue here is actually quite simple. At bottom, the question of pricing jurisdiction turns on the plain language of the specific statutory provisions in which Congress assigned pricing authority. Those provisions make clear that Congress intended State commissions to "establish" and "determine" rates in accordance with the pricing standards expressly laid out in the statute. 47 U.S.C. § 252(c), (d). The text of these provisions could not be clearer, and it leaves no room for the FCC's assertion of broad federal pricing authority. Simply put, Con-

gress considered this precise issue and determined that State commissions, not the FCC, should determine rates. That should be the end of the matter.

In the teeth of these directly applicable statutory provisions, the FCC claims that it has authority to issue enormously complex pricing rules that would turn State commissions into nothing more than "field agents" of the Washington bureaucracy, "sent out to execute the will of FCC officials."[8] That result simply cannot be squared with Congress's decision to assign expressly to State commissions the authority to determine rates according to the statutory standards.

Nor is it in any way supported by the ambiguous, general statutory provisions on which the FCC places exclusive reliance. Even if such general provisions could override a specific assignment of pricing jurisdiction—which they cannot—the provisions cited by the FCC have no applicability here. In particular, by its plain terms, section 251(d)(1)—on which the FCC rests most heavily—directs the agency merely to prescribe within six months whatever rules may be necessary to implement the specific requirements in *section 251* for which the FCC was given express responsibility, not the separate pricing standards in section 252 for which the States were given express responsibility. Nothing in this procedural provision confers any new substantive jurisdiction on the FCC, and certainly nothing in it can be read to override section 252's express grant of pricing jurisdiction to the States. Congress plainly knows how to give the FCC substantive jurisdiction over intrastate communications: it did precisely that in other portions of section 251, in other sections of the 1996 Act, and in the analogous Cable Act. The crucial language found in each of those provisions is altogether missing from section 251(d)(1).

Even if the Court were to find some ambiguity here, that would not change the result. Section 2(b), as a spe-

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[8] Joint Reply Brief for the State Commission Parties at 2 (8th Cir. No. 96-3321, filed Jan. 6, 1997).

cial rule of construction, reverses the usual principle of *Chevron* deference, so that any jurisdictional ambiguity is fatal to the FCC's position. As this Court explained in *Louisiana PSC*, only the most straightforward and unambiguous assignment of intrastate jurisdiction to the FCC can overcome the jurisdictional bar of section 2(b). Petitioners cannot sweep aside *Louisiana PSC* on the theory that section 251 *applies* to intrastate matters and that the FCC's jurisdiction is necessarily coextensive with the scope of the Act's provisions. As the FCC acknowledges, section 2(b) is written in the disjunctive—"nothing in this Act shall be construed to apply *or to give the Commission jurisdiction*" with respect to intrastate communications. As a result, it is not enough under section 2(b) that a provision of the Act applies to intrastate matters; the Act also must clearly and unambiguously give the FCC jurisdiction with respect to those matters. Petitioners have offered no plausible justification for ignoring the plain text of that provision.

The FCC argues that this Court should disregard section 2(b) in this case. Its theory, drawn from an "impossibility" doctrine developed by some courts of appeals, is that the local network is used for both intrastate and interstate calls, that only one regulatory authority can exercise pricing power over such indivisible facilities, and that Congress must have intended the FCC to be that regulatory authority. But the FCC relied on no such theory in its order, and for good reason: it is wrong. To begin with, most of the issues dealt with in the 1996 Act and addressed by the FCC's pricing rules are purely intrastate in nature and have no interstate component at all. Even where there is an interstate component, moreover, the settled jurisprudence is that the FCC may not preempt State price regulation merely because the same facility is used for both interstate and intrastate calls; rather, preemption is permissible only when the FCC can demonstrate with precision that State regulation negates the FCC's exercise of its own lawful interstate authority. And here, where the FCC has continued to exercise jurisdiction

over the pricing of interstate calls, the agency has not made—and cannot make—any such showing.

Finally, the FCC asks the Court to indulge the agency's attenuated jurisdictional inferences on the ground that it would be inefficient for 50 different States to apply the statute's pricing standards in disparate fashion. It claims that Congress must have expected the federal agency to issue general rules prescribing basic pricing methodologies, and must have intended the States to apply those rules in setting specific rates. But that is not what Congress said. On the contrary, Congress specifically *protected* the States' authority to issue rules implementing the Act's provisions. 47 U.S.C. § 261(b). And, in any event, the FCC's order goes far beyond the boundaries marked out by its lawyers in this Court: not only did the agency itself mandate specific "proxy" prices that States *must* apply, but also its extraordinarily detailed rules dictate specific results as to every other significant pricing matter, leaving the States with barely more than a ministerial role.

**II.** A number of the FCC's non-jurisdictional determinations are also incompatible with the 1996 Act. Most important, the Commission abrogated the statute's clear distinction between resale of an incumbent's finished telecommunications services and access to an incumbent's unbundled network elements. The 1996 Act permits resellers to purchase an incumbent's services only at rates based on the incumbent's retail price less any avoided costs. This pricing scheme ensures that the incumbent will continue to recover any universal service subsidy built into its retail rates; it also preserves incentives for new entrants to build facilities of their own.

The FCC's rules cut the legs out from under this statutory scheme. Those rules allow a competitor to obtain a finished service *not* at the wholesale rate required by statute, but at the cost-based rates reserved for unbundled network elements. Under the FCC's sham-unbundling theory, a reseller who wants to offer exactly the same service provided by an incumbent may freely circumvent the statutory scheme by requesting, on a fully pre-

combined and bundled basis, all of the "unbundled" network elements that the incumbent uses to provide the retail service.

That approach suffers from multiple flaws. First, the statute makes abundantly clear that unbundled elements, unlike resold services, need not be provided on a pre-combined basis. Congress required an incumbent to provide network elements only in a manner that allows "*requesting carriers* to combine such elements." 47 U.S.C. § 251(c)(3) (emphasis added). There is no ambiguity in that language, and it provides a complete response to the FCC's misguided attempt to require incumbents to provide pre-combined packages of elements to competitors.

Second, even if the Commission could properly ignore the terms of section 251(c)(3) and force incumbents, rather than "requesting carriers," to "combine" unbundled elements, the FCC's rules still violate the Act by allowing requesting carriers to obtain, at cost-based rates, *all* the pre-combined network elements needed to provide a service. Access to all those pre-combined elements is resale, plain and simple, and the statutory resale rules must apply if they are to have any meaning at all. Indeed, the FCC itself has recognized that this use of network elements must be distinguished from resale, and it has struggled in vain to find a substantive distinction of any significance. None exists. Further, the language of the 1996 Act expressly contemplates that a user of unbundled network elements will have a network of its own and that an incumbent will allow that user physical access to its facilities to connect the two networks. *See* 47 U.S.C. § 251(c)(2), (c)(3). Those statutory provisions would serve little purpose if access to unbundled elements were simply a way to requisition an incumbent's complete network.

The FCC also expanded beyond all recognition the statutory obligation to provide unbundled network elements. Congress directed the FCC, in determining what network elements should be made available, to consider whether the unavailability of such elements would "impair" the competitor's ability to provide service or, in the

case of proprietary elements, whether access to such elements is "necessary." 47 U.S.C. § 251(d)(2). The Commission simply read those requirements out of the 1996 Act. It determined that incumbents must allow competitors to lease their network elements even if equivalent facilities are freely available from sources other than the incumbent. That result cannot be squared with any reasonable understanding of "necessary" or "impair." Similarly, while Congress defined network elements in terms of the incumbent's "facilit[ies] or equipment" used to complete calls, the FCC expanded that rule to require incumbents to provide their competitors with assets, including their live operators, that have nothing to do with the incumbent's essential physical facilities.

**III.** Finally, the FCC grossly misread the Act's most-favored-nation provision in a manner that undermines Congress's reliance on private negotiations and binding agreements as the principal means of opening local telephone markets to competition. The statute provides that an incumbent must make available to a requesting carrier, "upon the *same terms and conditions*," any interconnection, service, or network element provided under a prior agreement to which the incumbent is a party. 47 U.S.C. § 252(i) (emphasis added). Under the Commission's "pick-and-choose" rule, however, a competitor may lift out of any of the incumbent's prior interconnection agreements the single term in each that is most disadvantageous to the incumbent, may leave behind the other terms and conditions in each such agreement, may stitch these unfavorable terms together, and may force the resulting agreement on the incumbent. That rule would preclude any semblance of free negotiation between incumbents and potential entrants. Any provision to which an incumbent agrees would immediately become a new high-water mark that could be selected by all other competitors—*even those who have already agreed to less favorable terms*—wholly without regard to the countervailing trade-offs embodied in the agreement as a whole. Nothing in section 252(i) can possibly be understood to justify this absurd result.

## ARGUMENT

### I. CONGRESS EXPRESSLY ASSIGNED PRICING JURISDICTION EXCLUSIVELY TO THE STATES AND DELIBERATELY PRESERVED THE STATUTE'S HISTORICAL PROHIBITION AGAINST FCC CLAIMS OF INTRASTATE JURISDICTION.

The FCC's jurisdictional argument is fundamentally misconceived. The agency starts from the premise that it has generic authority to implement every provision of the Communications Act, whether interstate *or* intrastate, because Congress could not possibly have enacted a statute that did not authorize FCC micro-management of every last interpretive issue. *See* FCC Br. 20-21. The agency then scours the statute looking for any general provision that could conceivably be read to support—however vaguely or inferentially—the agency's egocentric view that Congress has given it plenary authority over all intrastate matters.

But the FCC approaches the issue from precisely the wrong direction. First, contrary to the agency's argument, the strong presumption here—a presumption written into the very text of the Communications Act—is that Congress has "fence[d] off" intrastate matters "from FCC reach or regulation." *Louisiana PSC*, 476 U.S. at 370. As we discuss below, nothing in section 251(d)(1), section 201(b), or the grab-bag of other provisions on which the FCC relies overcomes that controlling principle. Even more to the point, Congress left nothing to the imagination on the crucial question of pricing jurisdiction: it *specifically* assigned that authority to the States. That express grant of authority would be decisive here even without section 2(b). In tandem with section 2(b), it provides overwhelming support for the Eighth Circuit's conclusion. Accordingly, it is with those directly relevant—indeed, dispositive—provisions that we begin.[9]

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[9] This brief focuses principally on the question of pricing authority, the lead jurisdictional issue presented in this case. The separate briefs of the Mid-Sized LECs and the United States Telephone

### A. The Plain Language of the 1996 Act Grants Pricing Jurisdiction to the States.

**1.** There is nothing ambiguous about the 1996 Act's assignment of pricing authority. Section 252(c)(2) empowers "a State commission" to "establish any rates . . . according to subsection (d)." In turn, section 252(d), entitled "Pricing Standards," specifies that "a State commission" is to "determin[e]" the relevant rates in accordance with the standards spelled out in the Act itself. Thus, section 252(d)(1) provides that "a *State commission*" shall determine the "just and reasonable rate" for interconnection and access to network elements based on the "cost . . . of providing" the interconnection or network elements. Section 252(d)(2) provides that "a *State commission*" shall consider reciprocal compensation for the transport and termination of traffic to be "just and reasonable" only if certain criteria are satisfied. Finally, section 252(d)(3) provides that "a *State commission* shall determine wholesale rates" for resale of complete telecommunications services by deducting from the current retail rate the "costs that will be avoided" by the incumbent carrier by selling at wholesale.

For all the ink that has been spilled, the question of pricing jurisdiction is ultimately just that simple. Sections 252(c) and (d) unambiguously give State commissions the authority to determine appropriate rates pursuant to the statutory pricing standards. Congress provided the pricing rules that it wanted followed, and it entrusted State commissions with the responsibility to determine rates in accordance with those rules. That express assignment of pricing jurisdiction to State commissions resolves the primary issue in dispute here. *See, e.g., Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 475 (1992) ("when a statute speaks with clarity to an issue judicial inquiry into the statute's meaning, in all but the most extraordinary circumstances, is finished").

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**Association expose flaws in other aspects of the FCC's jurisdictional assertions.**

**2.** Given the lucidity of this directly relevant statutory language—and the absence of any statement in the 1996 Act suggesting that the FCC was to have a role in pricing —the FCC can defend its assertion of pricing authority only by speculating that Congress intended to divide pricing authority in a manner that is nowhere evident on the face of the statute. The FCC conjectures that, notwithstanding the plain directives of sections 252(c) and (d), Congress gave it "concurrent" jurisdiction over pricing. FCC Br. 26. In particular, the Commission asserts that Congress expected the FCC to issue pricing rules governing "general methodological issues," even if it left to the States "considerable discretion" in applying those federal rules to particular cases. FCC Br. 26; MCI Br. 30.

That argument is remarkable for several reasons. Most fundamentally, the "concurrent" jurisdictional scheme exists only in the imagination of the FCC and its supporting petitioners. Congress told the *States* to "establish" and "determine" rates according to the standards set forth in section 252(d); it did not say that the *FCC* was to take the lead role in determining prices and that the States were merely to apply FCC-derived formulas to individual cases. The responsibility to "establish" and "determine" rates, under any natural reading of those terms, encompasses more than the rote application of detailed rules formulated by a different body. It necessarily subsumes as well the authority to develop pricing methodologies sufficient to satisfy the statutory standards. And, as we explain further below, nothing in section 251(d)(1) suggests that, despite the clear directives of section 252, Congress in fact intended to subordinate the States to the federal bureaucracy on pricing matters—indeed, nothing in even the most generous reading of section 251(d)(1) gives the FCC authority over any part of section 252.

In any event, the FCC's order belies the very theory of concurrent jurisdiction that its lawyers espouse in this Court. In a portion of the order that the FCC never even mentions in its brief, the Commission prescribed a set of *specific rates* (dubbed "proxy prices"), and it purported

to *require* State commissions to apply those specific rates until they could complete detailed cost studies sufficient to satisfy the FCC's TELRIC cost standards. *See* J.A. 719, 801-04, 867-70 (¶¶ 619, 792-794, 925-932).

Even apart from these specific proxy prices, the FCC's pricing rules were far more intrusive than its brief implies. It is simply inaccurate to say, as the Commission now insists, that the agency confined itself to "general methodological rules" and allowed the States "considerable discretion" in determining actual rates. In fact, the FCC promulgated detailed pricing standards that covered every rate issue of significance and that consigned the States to a subordinate role consisting largely of plugging numbers into FCC-generated formulas. Indeed, the FCC's explanation of its determinations as to pricing of interconnection, network elements, resale, and transportation and termination consumes more than 370 paragraphs of the agency's order. J.A. 719-836, 843-71, 925-65 (¶¶ 618-862, 878-934, 1046-1118). In short, the FCC left no pricing issue of significance to the discretion of the very State commissions to whom Congress expressly assigned pricing authority.

For that reason, the States themselves have understandably been much less sanguine than the FCC about the effect of the Commission's pricing rules on their traditional authority. As 30 States jointly explained to the Eighth Circuit, "[t]he detail in the [FCC's] rules offer little discretion to the states to use their knowledge of local conditions to 'establish' the actual rates that will be paid to the [incumbent carriers]. . . . [Under the federal agency's rules], [t]he States do not share an 'essential, overlapping role' with the FCC, but become field agents sent out to execute the will of FCC officials." [10] Nothing in the statute supports—and nothing in the FCC's brief comes close to justifying—the agency's arrogation of power to conscript

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[10] Joint Reply Brief for the State Commission Parties at 2 (8th Cir. No. 96-3321, filed Jan. 6, 1997).

these State regulators as foot soldiers for the federal bureaucracy.[11]

**3.** The structure of section 252(c) fortifies the conclusion that Congress entrusted pricing authority solely to the States. In defining the State commissions' arbitration responsibilities, section 252(c) creates a clear dichotomy between pricing and other matters. Subsection (c)(1) provides that, when States arbitrate "open issues" within the bounds of the matters assigned to the FCC, they must ensure that the result meets both "the requirements of section 251" *and* "the regulations prescribed by the [FCC] pursuant to section 251." Subsection (c)(2), by contrast, addresses pricing as a separate matter and makes *no* reference to any FCC rules. It provides only that States shall "establish rates . . . *according to subsection (d).*" Where Congress intended the State commissions to conform their arbitration decisions to FCC rules, it expressly said so. Congress said nothing about the State commissions following FCC *pricing* rules, precisely because no such FCC rules were contemplated. On the contrary, Congress intended the States alone to implement the Act's pricing standards, and that is why the only command to the States in section 252(c)(2) is that they set rates according to section 252(d). *See* Pet. App. 13a-14a.[12]

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[11] AT&T mistakenly asserts that this Court, in *Wilder v. Virginia Hospital Association*, 496 U.S. 498 (1990), inferred a federal rulemaking role despite a clear grant of authority to the States to develop methods and standards. AT&T Br. 26. AT&T overlooks a pivotal fact: the statute at issue in *Wilder* expressly gave the Secretary of Health and Human Services a supervisory role over the States' formulation of the relevant standards. In the very provision AT&T cites, Congress specified that each State must "'mak[e] assurances satisfactory to the Secretary'" concerning the adequacy of the "'standards'" it develops. *See* 496 U.S. at 503 (quoting 42 U.S.C. § 1396(a)(13)(A) (Supp. 1982)). It is the absence of any comparable language in section 252(d) of the 1996 Act that dooms AT&T's argument and validates the Eighth Circuit's jurisdictional holding.

[12] The same dichotomy is echoed elsewhere in section 252. Congress provided that a State commission may reject an agreement

The FCC argues that the Court should disregard this important textual evidence because the "open issues" with which subsection (c)(1) is concerned necessarily include open *rate* issues. But rate issues are dealt with specifically in section 252(c)(2), and for several reasons it would make no sense to subject those issues *also* to section 252(c)(1). First, the regulations to which section 252(c)(1) refers are those implementing section 251; they can have nothing to do with pricing, which is dealt with in section 252. Second, if section 252(c)(1) could nonetheless be read to mandate adherence to FCC pricing rules, section 252(c)(2) would be rendered wholly superfluous. But "[s]tatutes must be interpreted, if possible, to give each word some operative effect." *Walters v. Metropolitan Educ. Enters., Inc.*, 117 S. Ct. 660, 664 (1997). An interpretation that renders an entire provision superfluous is presumptively unreasonable. *See Lane v. Pena*, 116 S. Ct. 2092, 2100 (1996).

Finally, the FCC's argument ignores the 1996 Act's drafting history, which confirms that Congress separated out section 252(c)(2) as part of its effort to preserve State authority over the pricing of local interconnection arrangements. The predecessor to what is now section 252(c) was part of section 251 in the Senate bill that reached the Conference Committee. That predecessor provision, however, did *not* include the dichotomy now contained in section 252(c) and thus could have been read to require States to adhere to all FCC rules, including pricing rules. *See* S. 652, 104th Cong., 1st Sess. § 251(d)(5)(D) (1995) ("In resolving any open issues and imposing conditions upon the parties to the agree-

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adopted by arbitration only if it finds that the agreement "does not meet the requirements of section 251 . . ., including the regulations prescribed by the Commission pursuant to section 251 . . ., *or the standards set forth in subsection (d) of this section.*" 47 U.S.C. § 252(e)(2)(B) (emphasis added). As in section 252(c), Congress specifically differentiated between the statute's pricing standards and the FCC's regulations—further confirmation that the two things are separate from and unrelated to each other.

ment, a State shall ensure that the requirements of this section are met by the solution imposed by the State and are consistent with the Commission's rules defining minimum standards.").

In response to objections from the States,[13] however, the Conference Committee took several actions to revise the bill to protect traditional State authority over intrastate communications. First, the Conference Committee created a whole new statutory section, section 252, that treated pricing as a distinct issue entrusted exclusively to State authority. Then, to accommodate that important change, the Committee concurrently moved what had been part of section 251 to section 252(c) and, for the first time, bifurcated that provision to make clear that, as to pricing issues in particular, States need adhere only to the standards set forth in section 252(d) of the statute, not to any FCC regulations. *See* Conf. Rep. at 13. In combination with the plain language of sections 252(c) and 252(d), that history confirms that Congress affirmatively rejected a statutory scheme that would give the FCC the pricing authority it now claims and instead created one under which State commissions retain exclusive authority to set rates according to the statutory standards.

### B. Section 2(b) and this Court's Decision in *Louisiana Public Service Commission* Confirm That the States Retain Exclusive Authority over Pricing.

**1.** Even if the Court were to determine that section 252(c) and (d) leave some doubt about whether Congress decided to retain State authority over pricing mat-

[13] *See, e.g.*, Initial Comments of National Association of Regulatory Utility Commissioners, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, at 10 (FCC May 16, 1996) (describing States' efforts to influence the Act before the Conference Committee); Comments of the Florida Public Service Commission, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, at 8 (FCC May 15, 1996).

ters, the result here would be no different. For over 60 years, Congress has confined the FCC's jurisdiction to interstate and foreign communications and has reserved for the States jurisdiction over intrastate communications. Section 2(b) of the Act, which was part of the original Communications Act of 1934, states that "*nothing* in this [Act] shall be construed to apply *or to give the Commission jurisdiction* with respect to . . . charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier." 47 U.S.C. § 152(b) (emphasis added).

As this Court explained in *Louisiana PSC*, section 2(b) "defines the jurisdictional reach" of the FCC. 476 U.S. at 370. It "fences off" intrastate matters from the federal agency's authority, and its express limitations may be overcome only by an "unambiguous" and "straightforward" grant of specific intrastate jurisdiction to the Commission. *Id.* at 377. Section 2(b) thus functions both as a "jurisdictional limit[ation] on the power of [the] federal agency" and as a "rule of statutory construction" that prevents the FCC from asserting authority in any case where it is "*at least possible*" that Congress intended to withhold such power. 476 U.S. at 376 n.5, 377 (emphasis added); *see id.* at 379 (where the Communications Act was not a "perfect puzzle" providing "crisp answers to all of the contentions of either party," section 2(b) mandated rejection of the FCC's assertion of intrastate authority).[14]

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[14] Section 2(b) reinforces an already powerful presumption against federal preemption of State public utility regulation—an area that this Court has recognized is traditionally a State concern. *See Arkansas Elec. Coop. Corp. v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 377 (1983) ("the regulation of utilities is one of the most important of the functions traditionally associated with the police power of the States"). As the Court has explained, such "historic police powers of the States" may not be "superseded . . . unless that [is] the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

Moreover, because section 2(b) provides its "own specific instructions regarding the correct approach to the statute" (476 U.S. at 376 n.5), it necessarily prevents the FCC from claiming deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). *Compare* FCC Br. 17, 42; AT&T Br. 19. The *Chevron* rule is intended to honor a presumed congressional intention to delegate to a federal agency the policy-making authority to interpret an ambiguous statute. *See, e.g., Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 696 (1991). But when Congress itself spells out the governing interpretive principles—as it has done in the plain text of section 2(b)—its specific intentions necessarily override any discretion the agency might have to apply any "reasonable" construction of a provision. Were it otherwise, a tool designed to implement an unstated congressional delegation of interpretive authority would operate perversely to frustrate an *express* interpretive principle contained in the statute itself.

**2.** The 1996 Act did nothing to undermine section 2(b)'s well-established role as a guarantor of federalism. The 1996 Act is an amendment to the Communications Act—the "Act" to which section 2(b) applies—and the new statute does not purport to supersede section 2(b)'s directive that "nothing" in the Communications Act shall be construed to give the FCC intrastate authority.

In fact, Congress expressly rejected attempts to strip States of the jurisdictional protections that section 2(b) provides. Just as the Conference Committee restored State pricing authority by creating a separate section 252 and introducing the important dichotomy between section 252(c)(1) and (c)(2), that Committee also ensured that section 2(b) would apply with full force to the 1996 Act. Both bills that reached the Conference Committee would have added "part II of title II"—that is, the local competition provisions of the 1996 Act—to the list of provisions exempted from section 2(b). *See* S. 652, 104th Cong., 1st Sess. § 101(c)(2) (1995); H.R. 1555, 104th

Cong., 1st Sess. § 101(e)(1) (1995). But, again to address State concerns, the Conference Committee deleted the proposed amendment of section 2(b).[15]

Because of that revision, the statute as enacted leaves the traditional interstate-intrastate division wholly intact except where section 251 or 252 clearly provides otherwise. And, for all the reasons we have discussed, far from providing the kind of "straightforward" or "unambiguous" assignment of pricing authority to the FCC that would be necessary to overcome section 2(b), the 1996 Act expressly indicates that the *States* are to have authority over such matters. Given the language of section 252(c) and (d), one cannot sensibly deny that "[i]t is . . . at least *possible*" (*Louisiana PSC*, 476 U.S. at 377 (emphasis added)) that Congress intended States to retain their longstanding authority. In the face of any such uncertainty, section 2(b) precludes an interpretation that would give the FCC the intrusive intrastate pricing jurisdiction it here demands.[16]

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[15] The FCC responds to this significant legislative history by relying on an exceedingly strained inference from the *absence* of explanatory discussion in the Conference Committee's Report. But, contrary to the Commission's suggestion, the Conference Committee nowhere indicated that its removal of these revisions to section 2(b) was "a technical, non-substantive change." FCC Br. 33 n.13; *see* MCI Br. 32-33. On the contrary, the Committee made clear that alterations which, like this one, were not specifically discussed in the Conference Report included not merely "minor drafting and clerical changes," but also "conforming changes made necessary by agreements reached by the conferees." Conf. Rep. at 113. Because the conferees did make a number of significant changes in the statute to preserve State authority—changes that *were* discussed in the Report (*id.* at 117-26)—it was inevitable that the revisions to section 2(b) would be deleted to conform to those changes.

[16] The same jurisdictional analysis applies to the dialing parity issue addressed in the Eighth Circuit's separate ruling (and covered thoroughly in California's brief in this Court). As in the lead case, the statutory language indicates that intrastate dialing parity issues were within the jurisdiction of the States, not the FCC. *See* 47 U.S.C. § 271(e)(2)(B) (specifying the dates by which "a State"

**3.** The FCC and its supporting petitioners make two attempts to avoid the clear import of section 2(b) and this Court's decision in *Louisiana PSC*. Neither has merit.

**a.** First, the Commission invites the Court to disregard the plain language of section 2(b). Despite the acknowledged fact (FCC Br. 34) that section 2(b) speaks in the disjunctive—it states that "nothing in this Act shall be construed to apply *or* to give the Commission jurisdiction with respect to" intrastate matters—the FCC contends that it is simply inconceivable that Congress meant what it said. Working from the Washington-centric, and entirely counter-textual, assumption that Congress would *never* pass a communications statute without intending the FCC to superintend every aspect—even every *intrastate* aspect—of that law, the agency argues that section 2(b) cannot "logically" be read to "detach" the scope of the statute from the scope of FCC authority. *See* FCC Br. 34; MCI Br. 43-44.

But that argument cannot be squared with the language Congress enacted. This Court has "refused to ignore the statutory meaning which would be presumed from . . . disjunctive language," explaining that "the use of the term 'or' indicates an intent to give the nouns their separate, normal meanings." *Garcia v. United States*, 469 U.S. 70, 73 (1984); *see also Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979). As this Court recently admonished: "'Where there is no ambiguity in the words, there is no room for construction. The case must be a strong one indeed, which would justify a court in departing from the plain meaning of words . . . in search of an intention which the words themselves did not suggest.'"

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may or may not order dialing parity). Furthermore, the FCC cannot point to any unambiguous grant of dialing parity jurisdiction sufficient to overcome section 2(b). Indeed, the FCC expressly acknowledged in its dialing parity order that the interstate and intrastate aspects of dialing parity could easily be regulated separately. *See* J.A. 1183 (Second Report and Order, ¶ 37). That concession in itself is fatal to the Commission's jurisdictional assertion in this Court.

*United States v. Gonzales*, 117 S. Ct. 1032, 1036 (1997) (quoting *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95-96 (1820) (Marshall, C.J.)). Indeed, the language of section 2(b) is so free of ambiguity that the FCC hazards no textual argument at all to support its interpretation of the statute.

The only argument the FCC *does* make to support its idiosyncratic understanding of section 2(b) has already been rejected by this Court. The FCC contends that section 2(b) was intended exclusively to overturn the ruling in the so-called *Shreveport Rate Case* (*Houston, E. & W. Tex. Ry. v. United States*, 234 U.S. 342 (1914)). In the Commission's view, because that case dealt only with "ancillary" FCC jurisdiction over topics not expressly covered by the statute, section 2(b) cannot be understood to extend beyond that context. FCC Br. 34-35; MCI Br. 44-45. The argument crashes head-on into this Court's decision in *Louisiana PSC*. The respondents there, like petitioners here, argued that section 2(b) should be read narrowly as merely an attempt to overturn the *Shreveport Rate Case*. But the Court squarely rejected that assertion, holding that "the *Shreveport Rate Case* [does not] carry the load that respondents ask of it." 476 U.S. at 372. The Court concluded that, "given the breadth of [its] language," section 2(b) *cannot* be cabined in the very manner that the FCC suggests here. *Id.* at 373.

**b.** The Commission's other argument as to why the Court should not give effect to section 2(b)'s plain language is no more compelling. The FCC contends that, under a narrow exception recognized in some court of appeals decisions, it may use its *inter*state authority as an entering wedge to usurp control over all aspects of local, *intra*state communications.

The short—and conclusive—answer to this argument is that it appears *nowhere* in the FCC's 700-page First Report and Order. That is not surprising, because the Commission could not possibly have justified its jurisdictional claims on the basis of that theory.

The governing rule, under the cases the FCC itself invokes, is that the agency must demonstrate "with some specificity" that it is *"impossib[le]"* for both the FCC and a State to regulate a facility used jointly for interstate and intrastate calls and that the State's regulation "negates the exercise by the FCC of its own lawful authority over *interstate* communication." *NARUC v. FCC*, 880 F.2d 422, 429-30 (D.C. Cir. 1989) (emphasis added); *accord California v. FCC*, 905 F.2d 1217, 1243 (9th Cir. 1990). The First Report and Order contains no discussion at all of the impossibility doctrine, much less a showing of how the strict requirements of that preemption doctrine can be satisfied here.[17] That deficiency is fatal, because this Court has said repeatedly that courts may not accept "*post hoc* rationalizations for agency action." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983). An agency's order must be upheld, if at all, on "the basis upon which it purports to rest." *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947).

The FCC had good reason not to rely on any such analysis in its order. In the first place, this after-the-fact justification does not even support what the agency actually did in its order. The bulk of the matters for which the FCC purported to create pricing rules include services that have *no interstate component at all.* Resale of an incumbent's existing local services and reciprocal compensation for the transport and termination of local calls, for example, are purely intrastate matters. Indeed, although the FCC's brief to this Court completely ignores this in-

[17] The portions of the agency's order cited in the FCC's brief are not to the contrary. *See* FCC Br. 36-37 (citing Pet. App. 191a, 194a-95a, which reprint ¶¶ 84-85 and 90-93 of the First Report and Order (J.A. 448-49, 450-52. Those paragraphs merely explain the FCC's jurisdictional theory, including why it believed that a dual federal-State pricing regime for interconnection agreements would be inconsistent with sections 251 and 252. What is missing is any analysis of the sort necessary to sustain, in the face of section 2(b), an assertion of intrastate pricing jurisdiction.

convenient fact, the Commission actually *conceded* the point in the Eighth Circuit. *See* Brief for Respondents FCC and the United States at 30 (8th Cir. No. 96-3321, filed Dec. 23, 1996) (noting that certain matters covered by the agency's pricing rules, including the "resale of local exchange service," are "admittedly solely intrastate"). That alone is fatal to the FCC's impossibility claim. It is untenable to suggest that the 1996 Act tacitly lifts the section 2(b) bar as to some, but not all, of these pricing issues.

Even as to the one significant aspect of the pricing rules for which the FCC can plausibly identify an interstate component—access to unbundled network elements that may be used to deliver long-distance calls—the agency's theory plainly proves too much. Under the FCC's logic, the Commission would have had jurisdiction to impose every single one of its rules governing access to these local facilities, including its pricing rules, based entirely on its jurisdiction over interstate communications, *even before Congress adopted the 1996 Act.* Sections 251 and 252 were largely superfluous, in the FCC's view, because under the Communications Act the agency has had latent power for six decades to regulate intrastate rates for every aspect of the local network.

This Court rejected essentially the same argument in *Louisiana PSC.* The FCC there sought to preempt State depreciation rules and to substitute its own nationally uniform rules on the theory (echoed almost verbatim here) that the telephone equipment at issue was used for both interstate and intrastate calls and that "it makes no sense within the context of the Act to depreciate one piece of property two ways." 476 U.S. at 375. But, observing that "virtually *all* telephone plant that is used to provide intrastate service is also used to provide interstate service" (*id.* at 360 (emphasis added)), the Court *refused* to "confine[]" State regulation (as the FCC again asks the Court to do) "to intrastate matters which are separable from and do not substantially affect interstate communication" (*id.* at 373 (internal quotation marks omitted)).

After *Louisiana PSC*, the courts of appeals have consistently rejected similar FCC arguments in other contexts. The settled rule is that preemption may "*not* be justified merely by the dual intrastate and interstate aspects of [a particular service]; the FCC [has] to show that it [can]not separate the interstate and intrastate components of its regulation." *Public Util. Comm'n of Texas v. FCC*, 886 F.2d 1325, 1333 (D.C. Cir. 1989) (emphasis added); *see also Public Serv. Comm'n of Maryland v. FCC*, 909 F.2d 1510, 1516 (D.C. Cir. 1990). No such showing could be made here. The simple fact is that the FCC and the States have separately determined the prices for interstate and intrastate calls delivered over local telephone networks for more than 60 years, and the impossibility exception has never been applied in this context. And here, far from being powerless to regulate interstate aspects of unbundled network elements, the FCC has continued to issue regulations governing the interstate charges that incumbents may levy (or not levy) when competitors deliver long-distance calls over those elements. *See Competitive Telecom. Ass'n v. FCC*, 117 F.3d 1068 (8th Cir. 1997) (upholding FCC rules on payment of interstate access charges by purchasers of network elements).

Nor can the FCC demonstrate that a State commission's regulation of the rates for local interconnection would "negate" the federal agency's exercise of its own lawful interstate authority. In particular, while the FCC *assumes* that it has some sort of interstate pricing authority with respect to unbundled network elements beyond its traditional authority over charges assessed for the delivery of long-distance calls over the local network, that assumption begs the very question before the Court. Contrary to the FCC's supposition, it can point to *no* lawful pricing jurisdiction of its own that is even arguably negated by State pricing regulation, because Congress expressly assigned only to the States the authority to determine rates for access to network elements.

### C. Neither Section 251(d)(1) Nor Any of the Other Provisions Cited by the Commission Justifies the FCC's Assertion of Pricing Authority.

Unable to ground its argument in the directly applicable pricing provisions of the 1996 Act, and unable to circumvent the jurisdictional barrier of section 2(b), the FCC seeks support for its expansive jurisdictional aspirations elsewhere in the statute. But none of the provisions to which the Commission points gives the FCC supervisory power to regulate the pricing of local interconnection arrangements.

**1.** The FCC rests principally on section 251(d)(1). FCC Br. 18-20. That provision—which directs the agency to complete, within six months of enactment, all actions necessary "to establish regulations to implement the requirements of this section"—does not support the Commission's jurisdictional theory.

First, when Congress issues clear directions on a specific subject—as it did in authorizing State commissions to "determine" appropriate rates under the standards of section 252(d)—that specific directive takes precedence over a general provision like section 251(d)(1). "However inclusive may be the general language of a statute, it will not be held to apply to a matter specifically dealt with in another part of the same enactment. . . . Specific terms prevail over the general in the same or another statute which otherwise might be controlling." *Fourco Glass Co. v. Transmirra Products Corp.*, 353 U.S. 222, 228-29 (1957) (internal quotation marks omitted).

Second, section 251(d)(1) does not even purport to encompass the pricing provisions of section 252. Rather, its scope is confined, by its plain terms, to "the requirements of *this section*"—that is, section 251. The statutory pricing rules are not in "this section"—they are in section 252(d). Accordingly, the FCC's lead argument invites this Court to ignore the statute's specific assignment of pricing jurisdiction to the States in section 252 as well as the jurisdictional prohibition of section 2(b), in favor of

a general rulemaking provision that, on its face, imposes a time-limit for the FCC to implement *a different statutory section*. That approach does violence to the ordinary rules of statutory interpretation.

In an attempt to plug the holes in its argument, the FCC says that subsections 251(c)(2) and (c)(3), which impose interconnection and unbundling obligations on incumbents, refer to "the requirements of this section and section 252." FCC Br. 28 n.10. From that premise, it argues that its authority to implement section 251 extends by implication to section 252. But if Congress had intended the FCC to implement section 251 *and* section 252, it could easily have said so in section 251(d)(1). It had no reason to express such an intention in the circuitous fashion reflected in the FCC's reading.

Furthermore, the FCC's theory does not support what the agency actually did. The FCC's order claimed authority to set prices not only for interconnection and network elements under subsections (c)(2) and (c)(3)—the two provisions that mention section 252—but also for the purchase of services for resale under subsection (c)(4). In its argument here, however, the Commission neglects to mention that subsection (c)(4) contains no such reference to section 252. Even on its own terms, therefore, the FCC's argument falls short of its target: the agency has no textual foundation at all for its arrogation of authority to dictate pricing principles for resale. And this flaw in its analysis undermines the Commission's improbable theory that, despite the restrictive language of section 251(d)(1), "this section" must be understood to signify *both* section 251 *and* section 252.

Even if the FCC's analysis were not deficient on its face, it would be thoroughly discredited by section 252(d). That section demonstrates the real meaning of the references to section 252: it specifies in plain language that "a State commission" is to determine the just and reasonable rates "*for purposes of*" section 251(c)(2) and section 251(c)(3)—the very sections on which the FCC

relies for its appropriation of the States' ratemaking function. That specific and unambiguous provision closes the loop between section 251 and section 252 and makes clear that a State commission, not the FCC, has jurisdiction to determine prices. It therefore stands squarely in the path of the FCC's theory: one cannot plausibly infer from section 251's references to section 252 that Congress intended to give the FCC indirectly pricing authority that it withheld from section 251(d)(1) and that it conferred expressly on the States in section 252(d).

In any event, section 251(d)(1) actually has no bearing at all on the scope of the FCC's jurisdiction. As its plain language suggests, subsection (d)(1) deals not with jurisdiction, but with the distinct question of rulemaking power—and, as the Eighth Circuit held, it operates to restrict rather than expand that power. The section directs the FCC, "[w]ithin 6 months [after the date of enactment]," to "complete all actions *necessary to establish regulations* to implement the requirements of this section." 47 U.S.C. § 251(d)(1) (emphasis added). Nothing in that procedural mandate delegates substantive authority to the FCC, and it certainly does not do so in the unambiguous manner required to surmount the section 2(b) hurdle.

When Congress wanted to extend the FCC's authority to intrastate matters, it did so explicitly. In section 276 of the 1996 Act, for example, Congress not only directed the FCC to prescribe payphone regulations within nine months using terms nearly identical to those in section 251(d)(1),[18] but also separately gave the FCC substantive jurisdiction with respect to "each and every completed *intrastate and interstate* call," and expressly preempted any contrary state regulations. 47 U.S.C. § 276(b), (c) (emphasis added). Similarly, in section 225, a provision that predates the 1996 Act, Congress not only instructed the FCC to issue regulations within one year to implement the requirements

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[18] "[W]ithin 9 months [of enactment of the Telecommunications Act of 1996], the Commission shall take all actions necessary (including any reconsideration) to prescribe regulations that— . . . ." 47 U.S.C. § 276(b)(1).

of that section (*id.* § 225(d)(1)), but also provided that the Commission "shall have the same authority, power, and functions with respect to . . . *intrastate* communications" as it does with respect to interstate communications. *Id.* § 225(b)(2) (emphasis added).

And the Cable Act—to which the FCC itself pointed as a jurisdictional analog in the court of appeals—provides an even more vivid illustration. There, as in section 251(d)(1), Congress directed the Commission to prescribe regulations within 180 days to carry out its responsibilities under the Act. 47 U.S.C. § 543(b)(2). Unlike the 1996 Act, however, the Cable Act also assigned the Commission *substantive jurisdiction* over the rates to be charged by cable systems. The Cable Act provides that "[t]he Commission shall, by regulation, ensure that [cable] rates . . . are reasonable" (*id.* § 543(b)(1)), and it enumerates seven "factors" that the FCC is required to "take into account" in prescribing its rate regulations (*id.* § 543(b)(2)). Also unlike the 1996 Act, the Cable Act expressly directed State regulators to follow the FCC's rate regulations: "the rates for the provision of basic cable service shall be subject to regulation by a franchising authority . . . *in accordance with the regulations prescribed by the Commission.*" *Id.* § 543(a)(2)(A) (emphasis added).

These provisions bring sharply into focus the missing links in the FCC's statutory argument. The 1996 Act assigns the FCC *no* substantive pricing jurisdiction. Instead, Congress entrusted pricing authority entirely to State commissions. 47 U.S.C. § 252(c), (d). Nor does the 1996 Act require States to follow any FCC pricing rules. On the contrary, as we have discussed, Congress went out of its way in section 252(c) to specify separately that States are to set rates only "according to subsection (d)."

The FCC would have this Court treat section 251 as if it contained the same terms found in these other provisions, an approach that cannot be squared with fundamental canons of statutory interpretation. As this Court

has said repeatedly, " '[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.' " *Bates v. United States*, 118 S. Ct. 285, 290 (1997) (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)).

**2.** Because the language of section 251(d)(1) is so different from the text of these other provisions—and so clearly fails to provide the requisite straightforward grant of pricing jurisdiction—the FCC must rummage through the statute searching for other shreds of supporting evidence. Its quest is fruitless.

The FCC argues most strenuously that, unless section 251(d)(1) provides sweeping jurisdiction over *every* local competition issue, including pricing, there is no way to explain how the FCC obtains authority over other specific issues as to which all parties agree that the FCC has some role. According to the FCC, these other provisions "assume[]" a separate assignment of pricing authority that can come only from section 251(d)(1). FCC Br. 22.

But no such inference is required to make sense of these other provisions. On the contrary, where Congress wanted the FCC to exercise authority over a specific matter, it made that quite clear on the face of the statute. Section 251(e)(1), for example, grants the FCC "exclusive jurisdiction" over the administration of "telecommunications numbering." Similarly, section 251(h) states that "[t]he Commission may, by rule, provide for the treatment of a local exchange carrier (or class or category thereof) as an incumbent local exchange carrier." And section 251(b)(2) makes plain that the Commission is to "prescribe" the "requirements" for "number portability." There is nothing either equivocal or obscure about these specific grants of jurisdiction, and there is consequently no need at all to invest section 251(d)(1) with

an importance that its plain language will not support. Indeed, the real question here is this: if section 251(d)(1) *already* provided the FCC with generic authority over all of sections 251 and 252, why would Congress have included these specific delegations of authority to the FCC?

Section 251(d)(2), on which the FCC places particular reliance, does not differ meaningfully from these other grants of authority. By stating that the FCC must consider certain factors "in determining what network elements should be made available," that provision *itself* necessarily authorizes the FCC to make such a "determina[tion]" in the first place. Indeed, the FCC has read the provision in precisely that fashion. *See* J.A. 546 (¶ 279) (discussing the "authority we derive from section 251(d)(2)").[19] There is simply no basis for the Commission's theory that the syntax of section 251(d)(2) bears significant jurisdictional implications that dictate a reading of section 251(d)(1) not supported by the plain terms of that provision.

In any event, the fact that the FCC is driven to rely on such tenuous implications from statutory provisions having nothing to do with pricing demonstrates just how far the agency has strayed from establishing that Congress straightforwardly and unambiguously granted it intrastate jurisdiction. Indeed, the FCC's arguments on this score again conflict with *Louisiana PSC*, where this Court concluded that much stronger—and more directly applicable—implications in the statutory te[illegible] fell short of the clear

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[19] The FCC has similarly relied upon the other specific provisions in section 251 as sources of authority. *See, e.g.*, First Report and Order and Further Notice of Proposed Rulemaking, *Telephone Number Portability*, 11 FCC Rcd 8352, 8370, 8411 (¶¶ 36, 114) (1996) ("section[] 251(b)(2) . . . give[s] to the Commission the authority . . . ."); *id.* at 8417 (¶ 126) ("section 251(e)(2) gives us specific authority"); *id.* at 8464 (¶ 220) ("section 251(e)(2) gives the Commission the authority").

congressional directive necessary to overcome section 2(b).[20]

The other provisions on which the FCC relies provide even weaker evidence of a congressional design to subject States to all-encompassing supervision by the federal bureaucracy. Contrary to the FCC's argument, section 251(d)(3) is an *anti*-preemption provision which limits the FCC's ability to "preclude the enforcement" of any *State* access or interconnection [illegible]gulations. That subsection, like the many other anti-preemption provisions in the statute,[21] is intended to preserve State authority and presumes that the States, not the FCC, have authority to adopt intrastate access and interconnection regulations in the first instance. Section 253(d), another provision cited by the Commission, also undermines the

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[20] In *Louisiana PSC*, respondents asked the Court to infer from indications in section 220 that Congress " 'clearly intended' " to give the FCC authority over depreciation issues for both interstate and intrastate purposes. *See* 476 U.S. at 367-68 (quoting respondents' brief). Respondents stressed, among other things, (1) that a subsection of section 220 made it unlawful to "keep *any* other accounts" apart from those mandated by the FCC, (2) that another part of section 220 required all carriers to adhere to FCC rules over any contrary State rules unless the FCC specifically "except[s]" them from federal regulation, and (3) that the FCC must have been given intrastate authority because a provision authorized the States only to "present [their] views" to the federal agency. *See id.* This Court found that these provisions, even in combination, were not sufficient to grant the FCC intrastate authority. *Id.*

[21] *See, e.g.*, 47 U.S.C. 261(b) ("Nothing in this part shall be construed to prohibit any State commission from . . . prescribing regulations . . . in fulfilling the requirements of this part, if such regulations are not inconsistent with the provisions of this part."); 1996 Act § 601(c) ("This Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided in such Act or amendments." (reprinted at 47 U.S.C. § 152 note)).

FCC's claim. Section 253(d) again assumes that the States, not the FCC, will issue rules in the first instance. It authorizes the FCC to preempt such rules only where it determines, on a case-by-case basis and "after notice and an opportunity for public comment," that a State "has permitted or imposed" an offending legal requirement. 47 U.S.C. § 253(d). That case-specific, after-the-fact preemption authority does not empower the Commission, acting in advance and without reference to any particular requirements, broadly to displace the States from their historical regulatory domain.[22]

**3.** The FCC also suggests that section 271 provides "compelling evidence" of the federal agency's pricing authority. *See* FCC Br. 29-31; AT&T Br. 31-32. In the FCC's view, because section 271 authorizes the FCC to assess a Bell company's compliance with section 271's "competitive checklist" in order to determine whether the company may provide long-distance service, and because the checklist requires interconnection "in accordance with the requirements of sections 251(c)(2) and 252(d)(1)"

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[22] The final item on the FCC's laundry list of inapplicable 1996 Act provisions is section 160, the statutory "forbearance" provision. Because the FCC and its supporters failed to present this argument in their briefs below, the court of appeals refused to consider it (Pet. App. 13a n.11), and this Court should do likewise. In any event, it has no merit. As the FCC notes (FCC Br. 24-25), section 160 states that the FCC may not forbear from applying *"the requirements* of section 251(c)," which impose obligations on incumbent LECs. 47 U.S.C. § 160(d). But there is no dispute here that the FCC has authority over certain aspects of section 251(c): Congress expected the FCC to impose appropriate limitations on resale (*see* 47 U.S.C. § 251(c)(4)(B)) and to determine "what network elements should be made available for purposes of subsection (c)(3)" (*see* 47 U.S.C. § 251(d)(2)). Contrary to the FCC's claim, it would not have "made little sense" for Congress to preclude the forbearance of these provisions until section 251(c) is "fully implemented." FCC Br. 24-25. What *does* make little sense is to read into this forbearance provision an implication that the FCC must have pricing jurisdiction nowhere granted in the Act's substantive provisions.

(47 U.S.C. § 271(c)(2)(B)(i)),[23] section 271 necessarily authorizes the agency to formulate substantive pricing standards. *See* FCC Br. 29-31.

That inference is unwarranted. Section 271 by its terms neither creates pricing standards nor empowers the FCC to define any such standards. Instead, it incorporates the substantive pricing determinations that the statute entrusts to State commissions: the pricing "requirements" to which section 271 refers are the "just and reasonable rate[s]" that are "[d]etermin[ed] by a *State commission.*" 47 U.S.C. § 252(d)(1) (emphasis added). With respect to pricing, therefore, it necessarily follows that the FCC, in passing on a section 271 application, can require no more than interconnection in accordance with the pricing principles promulgated *by the States* pursuant to sections 251 and 252.

Contrary to the FCC's supposition, this conclusion does not force the FCC to "abdicate [its] compliance inquiry to each of 50 state commissions." FCC Br. 30. On the contrary, the FCC still has the ultimate responsibility to "find[]" (47 U.S.C. § 271(d)(3)) whether a Bell company is in *compliance* with the relevant pricing requirements—in statutory terms, the Bell company has "fully implemented" its obligations. The State commissions' responsibility, by contrast, is to *define* the pricing obligations with which the Bell company must comply. Those discrete roles are wholly compatible and complementary.[24]

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[23] *See also* 47 U.S.C. § 271(c)(2)(B)(ii), (xiii), (xiv).

[24] Nor does the existence of the Communications Act's administrative complaint provision, 47 U.S.C. § 208, provide any support for the notion that the FCC is expected to play a role in reviewing State pricing determinations. *See* AT&T Br. 29, 30; MCI Br. 38. On the contrary, as the Eighth Circuit correctly held (Pet. App. 31a-34a), Congress prescribed a carefully tailored review mechanism under which any aggrieved party may seek relief only from a *federal district court*, not from the FCC. *See* 47 U.S.C. § 252(e)(6). Nothing in section 208 permits the FCC to override that congres-

**4.** Finally, section 201(b) does not fill the FCC's jurisdictional void. Wrenching the last sentence of section 201(b) entirely out of context, the FCC claims that section 201 allows the FCC to exercise jurisdiction over every section of the Communications Act, whether interstate or intrastate. *See* FCC Br. 19-20. But section 201, by its plain terms, involves only the FCC's authority over "*interstate or foreign* communication" services. 47 U.S.C. § 201(a) (emphasis added). It is altogether implausible to infer that section 201(b) provides "unqualified textual authority" (FCC Br. 20) wholly detached from the limitations contained in section 201(a). On the contrary, section 201(b) uses the phrase "*such* communication service," and the word "such" plainly refers to the "*interstate or foreign* communication" services mentioned in the immediately preceding sentence in section 201(a). Thus, the FCC's argument ultimately boils down to the improbable proposition that, unlike every other aspect of section 201, the last sentence of section 201(b)—the sentence that gives the FCC authority over the "provisions of this Act"—applies to intrastate as well as interstate matters. But all statutory language, "plain or not," must be read in context. *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991). And the context here plainly forecloses the FCC's understanding.

Furthermore, Congress does not legislate in a vacuum. Section 201(b), like every other provision of the Act, must be read in light of section 2(b), which establishes the jurisdictional framework on which Congress has built the statute. If an isolated sentence in a provision dealing exclusively with interstate and foreign communications can be ripped out of that provision and construed to

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sional determination by holding itself out as an alternative forum for reviewing precisely the same State determinations. *Cf. Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 209 (1994). That conclusion is fortified by the fact that the FCC's jurisdiction to hear complaints under section 208 is necessarily limited by the proscription of section 2(b). *See* Pet. App. 33a-34a.

give the FCC intrastate jurisdiction denied to the agency by section 2(b), then Congress truly wasted its breath when it stated that "nothing in [the Communications Act] shall be construed . . . to give the Commission jurisdiction with respect to" intrastate matters. The Court should reject this distorted reading of the statute. *See Louisiana PSC*, 476 U.S. at 369-70 (refusing to read 47 U.S.C. § 151, which sets forth the purposes of the Communications Act, in a manner inconsistent with section 2(b)).[25]

### D. The FCC's Policy Arguments Do Not Support a Different Result.

In perhaps its most audacious argument, the FCC, joined by AT&T and MCI, presumes to second-guess the litigation judgment of the State commissions that have expended considerable resources vindicating their jurisdictional prerogatives. The FCC claims that the State commissions are wasting their time and money, because even if they prevail in this case, they will have gained no greater authority. As the FCC sees the matter, the federal courts will ultimately dictate the proper results to the States in reviewing arbitration decisions under section 252(e)(6). To the FCC, the only question here is not "whether" the States will be put in a federal straitjacket but "when." FCC Br. 40.

The FCC is wrong in all respects. To begin with, the decentralized, State-centered scheme the FCC decries as

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[25] Nor does section 4(i) advance the FCC's position. *Compare* FCC Br. 19-20 n.5; MCI Br. 28 n.19. It is merely a generic "necessary and proper" clause empowering the FCC to execute the substantive authority granted elsewhere in the statute; it confers no added jurisdiction itself. *California v. FCC*, 905 F.2d 1217, 1241 n.35 (9th Cir. 1990); *AT&T v. FCC*, 487 F.2d 865, 877 (2d Cir. 1973). The same is true of section 303(r), which applies *"except as otherwise provided in this [Act]"* (47 U.S.C. § 303 (emphasis added)) and which appears in Title III of the Act: "Provisions Relating to Radio." Neither of these provisions can take precedence over the allocation of pricing authority in section 252 or the jurisdictional rule of section 2(b).

"cumbersome" is known as federalism, and it is the scheme that Congress believed best in these circumstances. The FCC's self-aggrandizing belief that Congress would have done better by centralizing all significant authority in Washington is an argument best made to the legislature, not this Court.

Equally important, the FCC's theory is predicated on a mistaken premise. The statute does not impose a one-size-fits-all regime in which every question has only one possible answer. Rather, the statute leaves room for differing discretionary judgments, allowing each State sufficient latitude to adapt the Act in a manner that best accommodates local needs and circumstances. That explains why Congress, perhaps anticipating the FCC's preemptive jurisdictional appetite, was so careful to protect the authority of State commissions to implement the statute's local competition provisions. It provided that "[n]othing in this part [*i.e.*, the provisions relating to local competition] shall be construed to prohibit any State commission from . . . prescribing regulations . . . in fulfilling the requirements of this part, if such regulations are not inconsistent with the provisions of this part." 47 U.S.C. § 261(b). That guarantee of State autonomy and discretion forecloses the FCC's vision of monolithic federal regulatory control and undermines its theory that the States are limited to adjudicating disputes according to rules announced in Washington.

To be sure, the statute imposes limits on the States' discretion—limits that the federal courts have authority to enforce.[26] But within the bounds of those limitations, the statute has sufficient play in its joints to permit States to

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[26] For example, Congress meant what it said when it required prices to be based on the incumbent's "cost . . . of providing" interconnection or network elements. 47 U.S.C. § 252(d)(1). Broad though the States' leeway may be, they could not lawfully set rates that disregard an incumbent's actual costs.

resolve disputes in reasonable ways that may vary from jurisdiction to jurisdiction.[27]

## II. THE FCC'S UNBUNDLING RULES CANNOT BE RECONCILED WITH THE LANGUAGE, STRUCTURE, OR PURPOSES OF THE 1996 ACT.

In the 1996 Act, Congress was careful to preserve a clear statutory distinction between resale and the purchase of unbundled network elements. It established separate pricing schemes and separate marketing rules for the two modes of entry. And it placed various limitations on the purchase and use of unbundled network elements. For example, the Act defined network elements only in terms of the incumbents' physical facilities (not its services); an incumbent must make network elements available only if their absence would otherwise impair the new entrant's ability to provide local service; and, most important, the requesting carrier, not the incumbent, has the responsibility to "combine such elements in order to provide . . . tele-

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[27] AT&T seeks illegitimately to smuggle into this case, under cover of its jurisdictional arguments, challenges to non-jurisdictional rulings that it failed to preserve in its petition for certiorari. *See* AT&T Br. 32-34. Nothing in the questions presented or the arguments made in that petition provided either the Court or the parties with notice that AT&T intended to raise these collateral, non-jurisdictional issues. This Court therefore should not consider them. *Taylor v. Freeland & Kronz*, 503 U.S. 638, 646 (1992) ("The Court decides which questions to consider through well-established procedures; allowing the able counsel who argue before us to alter these questions or to devise additional questions at the last minute would thwart this system."). In any event, AT&T's substantive arguments are meritless. The Eighth Circuit vacated each of the rules that AT&T defends, not because of any jurisdictionally based theory concerning the FCC's interpretive authority (*see* AT&T Br. 32-33), but because each violated the plain language and structure of the 1996 Act. *See* Pet. App. 46a-47a (presumption that incumbents must provide access to network elements to the extent technically feasible is "contrary to the plain meaning of the Act"); *id.* at 51a-52a (FCC's "superior quality" rules "cannot stand in light of the plain terms of the Act"); *id.* at 52a-53a (FCC's rules on combining elements not currently linked in the incumbent's network conflicts with the statute's "plain meaning").

communications service." 47 U.S.C. § 251(c)(3). Thus, although the incumbent must make physical parts of its network available to the new entrant, it is up to the new entrant itself to incorporate those pieces into its own network in order to provide a finished service. The use of unbundled elements is therefore fundamentally different from resale, in which a competitor purchases the incumbent's finished retail service at a wholesale price for resale to the competitor's customers.

The FCC's regulations utterly obliterated the statutory distinction between resale and the use of unbundled network elements. Most egregiously, the Commission allowed new entrants to purchase all the elements necessary to provide the same finished service that the incumbent provides and required the incumbent itself to combine those network elements into such a complete service for the new entrant. Consequently, a competitor without any facilities of its own and without performing any additional work can order the functional equivalent of resale—all the incumbent's network elements pre-combined into the same finished service provided by the incumbent—under the separate pricing and marketing rules that are supposed to apply only to unbundled network elements. At the same time, the Commission expanded the definition of network elements beyond all proper bounds and vitiated statutory restrictions on the circumstances under which a new entrant can order those elements.

Each of the Commission's rules that we discuss below is contrary to the language and structure of the statute, and each is inconsistent with Congress's goals in the 1996 Act—increased competition through greater investment and innovation, the preservation of universal service, and enhanced consumer welfare. Taken together, these rules thoroughly undermine those objectives and yield a scheme that bears no resemblance to the one Congress enacted into law.

### A. The FCC Has Destroyed the Statutory Distinction Between Resale and Unbundled Network Elements.

**1.** The 1996 Act requires incumbents to offer network elements to entrants "on an unbundled basis at any technically feasible point" and in a "manner that allows requesting carriers to combine such elements in order to provide . . . telecommunications service." 47 U.S.C. § 251(c)(3). This rule allows companies that have some network facilities of their own to fill in their networks by purchasing individual pieces of the incumbent's network. Congress understood, for example, that cable television companies planned to use their existing door-to-door networks to carry telephone calls as well as TV signals, but lacked the switches needed to direct calls from one customer to another. *See* Conf. Rep. at 148. Similarly, the press reported during consideration of the 1996 Act that AT&T had already installed local telephone switches, but would seek to buy the wires (known as "local loops") needed to connect those switches to individual homes and businesses.[28] Access to unbundled elements is a way to assist such *facilities-based* carriers by giving them access to specific elements so that they will not have to replicate the incumbent's entire network overnight. *See* Conf. Rep. at 148 (recognizing "that it is unlikely that competitors will have a *fully* redundant network in place when they initially offer local service" and that competitors may need initially to obtain "[*s*]*ome* facilities and capabilities (*e.g.*, central office switching)" from the incumbent) (emphasis added).

Resale is different. Instead of giving facilities-based competitors an opportunity to obtain and combine individual pieces of the incumbent's network, resale allows competitors *without* facilities—or without facilities sufficient to provide certain services or to meet the needs of certain customers—to obtain at wholesale prices the *complete* telecommunications services that the incumbent

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[28] *See* John Keller, *AT&T Eagerly Plots a Strategy to Gobble Local Phone Business*, Wall St. J., Aug. 21, 1995, at A1.

currently provides at retail. *See* 47 U.S.C. § 251(c)(4)(A) (requiring incumbents "to offer for resale at wholesale rates any telecommunication service that the carrier provides at retail to subscribers who are not telecommunications carriers").

Congress did not intend these methods of entry to be interchangeable. On the contrary, the 1996 Act repeatedly distinguishes between them. Most importantly, Congress provided different pricing rules for each mode of entry. Users of network elements need pay rates based only on the incumbent's "cost . . . of providing" those elements. *See id.* § 252(d)(1)(A). By contrast, resellers pay rates based on the retail prices that the incumbent currently charges its customers for the services at issue. The statute directs State commissions to determine wholesale rates "on the basis of the [incumbent's] retail rates charged to subscribers" less only those costs that "will be avoided" by selling at wholesale. *Id.* § 252(d)(3).

Nor is that the only distinction between resale and unbundled network elements. The 1996 Act allows the major long-distance carriers to offer jointly marketed local and long-distance service *only* if they enter the local market by using some of their own facilities, supplemented as necessary by the incumbent's network elements. If these companies enter merely as resellers, they may not offer such "one-stop shopping" packages of local and long-distance services for three years or until the relevant Bell company receives long-distance authority. *See* 47 U.S.C. § 271(e)(1).

These statutory distinctions serve crucial purposes. First, as we have explained, most jurisdictions require incumments to charge below-cost rates for basic service (especially for rural and residential customers), and allow incumbents to offset those under-recoveries by charging above-cost rates to business and other customers. And, contrary to the baseless suggestion in MCI's brief (MCI Br. 25), that situation may persist indefinitely: while section 254(f) requires States with a universal service pro-

gram to ensure that all carriers contribute equitably to universal service, it does not specify a date certain for the removal of implicit *intra*state subsidies.

If, during the potentially lengthy period in which incumbents must rely on these implicit subsidies to recover their costs, new entrants may obtain complete services at cost-based rates, they will easily siphon away the incumbents' valuable business customers. They will do so *not* by providing a better or lower-cost service, but simply by undercutting the above-cost rates that incumbents must charge to subsidize their other services. Such regulatory arbitrage would take away the revenues that incumbents use to support affordable rates for rural and residential consumers, leading to massive pressure on the rates of those consumers and enormous losses for incumbents.

Simply put, the end result of such gamesmanship would be that competitors would steal incumbents' profitable customers without adding any value to the incumbents' service and would leave incumbents with the high-cost customers that competitors have no interest in serving. By tying wholesale prices to *retail* rates and thus ensuring that these prices account for universal service subsidies, Congress sought to avoid these negative effects. *See* H.R. Rep. No. 104-204, at 72 ("The [wholesale] rate should reflect whether, and to what extent, the local dialtone service is subsidized by other services . . . .").

Second, as even the FCC has recognized, "[t]he interconnection provisions of the Act, Section[s] 251 and 252, are designed to promote *facilities-based* local exchange competition." Notice of Proposed Rulemaking, Order on Remand, and Waiver Order, *Amendment of the Commission's Rules to Establish Competitive Service Safeguards for Local Exchange Carrier Provision of Commercial Mobile Radio Services*, 11 FCC Rcd 16639, 16678-79 (¶ 80) (1996) (emphasis added). Congress understood that a vigorous competitive market in local telephony will exist only when newcomers have built their own physical facilities to

compete with the incumbent's networks. The Act is thus intended to "give[] new entrants the incentive to build their own local facilities-based networks, rather than simply repackaging and reselling the local services of the local telephone company." 141 Cong. Rec. H8465 (daily ed. Aug. 2, 1995) (Rep. Goodlatte); Conf. Rep. at 1 (statute intended "to accelerate rapidly private sector deployment of advanced telecommunications and information technologies"). *See generally* 3A Philip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 773b1 at 204 (revised ed. 1996) ("competition [is] increased by encouraging [firms] to [develop rival facilities], rather than taking the easier and less competitive course of obtaining access to another's facilities").

The statutory pricing rules are carefully calibrated to achieve that goal. A reseller must pay a wholesale price that reflects the universal service subsidies built into the incumbent's retail rates; it can compete with the incumbent by performing marketing and billing functions more efficiently. A facilities-based competitor, by contrast, can avoid the universal service component in the incumbent's retail rates, and it can seek efficiency advantages throughout its network. To the extent that it does not yet have a complete network of its own, moreover, it can purchase at cost-based rates the incumbent's individual network elements. The statute thus encourages a new entrant to avoid buying at wholesale, but only by building a network of its own, supplemented where necessary with the incumbent's unbundled network elements.

**2.** Ever since Congress enacted the 1996 Act, however, AT&T and MCI have fought to obtain the very thing that Congress denied them—the ability to obtain incumbents' complete retail services at cost-based rates instead of wholesale rates based on current retail prices.

The mechanism that AT&T and MCI have seized upon to obtain that goal is the so-called unbundled network element "platform." Under the "platform" approach, AT&T and MCI do not expressly ask an incumbent for access to a particular finished service for resale. Instead,

they ask for the same thing using different words: they request *all* the network elements needed to replicate that same service, *already combined* in the configuration necessary to provide the service. Simply by using those different words, AT&T and MCI hope to obtain the identical product—the finished retail service of the incumbent carrier—at much lower, cost-based rates. For the reasons we have discussed, if AT&T and MCI are allowed to use this "platform" approach, they will obtain enormous, guaranteed profits through regulatory arbitrage without making any contribution to universal service, without investing in any facilities, without incurring any of the ongoing costs associated with maintaining a real telecommunications network (costs related to such obligations as testing and repairing facilities and maintaining network records), and without undertaking any business risk. As AT&T's President accordingly boasted, the "platform" is simply *"another way to resell,"* but it results in discounts for AT&T that are as much as *300%* larger than those authorized under the statutory resale pricing rules.[29]

Instead of putting a stop to these improper and destructive attempts to evade the statutory resale rules, the FCC has chosen to facilitate them. The FCC's rules permit a new entrant to pay cost-based rates and to avoid the joint marketing proscription even when that entrant does nothing more than a reseller—that is, even when it (1) relies exclusively on the incumbent's network elements to recreate an existing end-to-end service and (2) obtains those elements *already combined* by the incumbent into that complete service. *See* J.A. 551-54, 571-76 (¶¶ 292-297, 328-341); 47 C.F.R. § 51.315(b)-(f).

Incumbent carriers challenged both of those determinations in the Eighth Circuit. That court upheld the rule allowing entrants to obtain all the elements needed to

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[29] Transcript, AT&T Investment Community Meeting (March 3, 1997) (comments of John Zeglis) (attached to Petition for Rehearing of GTE entities, *et al.* (8th Cir. No. 96-3321, filed Aug. 19, 1997)).

provide service, but only because it vacated the series of FCC rules allowing entrants to obtain all of those elements on a pre-combined basis. Pet. App. 53a-58a, 70a-71a. As we now explain, both sets of FCC rules are inconsistent with the text and structure of the 1996 Act.

**3.** The fundamental principle here is clear—Congress placed specific limitations on the use of resale, and those limitations must be respected. Accordingly, AT&T and MCI cannot obtain all the pre-combined elements necessary to provide service and pretend that they are anything other than resellers who should be subject to the statutory resale restrictions.

**a.** First, it is clear from the face of the 1996 Act that one of the fundamental distinctions between resale and the use of network elements is that, unlike finished services for resale, network elements are provided on an individual piece-by-piece basis. If a competitor wants to use multiple elements, the competitor itself must combine those elements.

In particular, the 1996 Act says in no uncertain terms that incumbents need only provide "access to network elements on an unbundled basis" and only in a "manner that allows *requesting carriers* to *combine such elements*." 47 U.S.C. § 251(c)(3) (emphasis added). As the Eighth Circuit correctly stated (Pet. App. 70a), this language simply cannot "be read to levy a duty on the incumbent LECs to do the actual combining of elements." The incumbent must "provide elements in a manner that enables the competing carriers to combine them," but the "requesting carriers"—not the incumbent—are expected "to combine the unbundled elements themselves." *Id.* It is difficult to see how Congress could have been any clearer on that point.

The FCC's response to the plain language of section 251(c)(3) focuses on the word "unbundled." The agency contends that, in past orders, that word has referred

exclusively to charging separate prices for different services. FCC Br. 44. Accordingly, the FCC argues, as long as they are priced separately, network elements are still "unbundled" even if they are pre-combined by the incumbent into a complete, ready-to-use service.

As an initial matter, the FCC is wrong that, even in isolation, "separately priced" is the only reasonable, or even the most plausible, meaning of the word "unbundled." On the contrary, just last year, the Commission itself used the word "unbundle" as a synonym for "physically sever": "Although we conclude that shared transport is *physically severable* from switching, incumbent LECs may not *unbundle* switching and transport facilities that are already combined, except upon request by a requesting carrier." [30] The FCC's claim that "unbundled" has a single, predetermined meaning that contradicts the Eighth Circuit's conclusion is thus contrary to petitioners' *own* prior usage of that word.

In any event, like all statutory terms, the word "unbundled" must be understood in context. *See St. Vincent's Hosp.*, 502 U.S. at 221. Given that "requesting carriers" are to "combine such elements" under section 251(c)(3), the context here requires the conclusion that the Eighth Circuit reached. It is the responsibility of the requesting carrier physically to combine the various piece-parts that it receives from the incumbent in order to provide a finished telecommunications service. The

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[30] J.A. 1385 (Third Order on Reconsideration, ¶ 44) (emphasis added). *See also* J.A. 597-98 (¶ 384) ("[o]*ne way to unbundle* an individual loop" is *"to separate the unbundled loop(s)* prior to connecting the remaining loops to the switch") (emphasis added); Department of Justice Reply Comments, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, at 28 n.33 (FCC May 30, 1996) ("[i]n jurisdictions which have begun to open up local markets by requiring the *unbundling* of the local network into the loop . . ., local switching and interoffice transport elements, a variety of problems have developed in *separating* a customer's loop . . . from the local switch") (emphasis added).

incumbent itself has no obligation to combine those elements for its competitor. In this context, the unbundled network elements are not only separately priced, but also physically separate.

Significantly, even the FCC makes no attempt in this Court to resuscitate its now-vacated rules requiring incumbents to combine elements in new ways at a competitor's request. *See* 47 C.F.R. § 51.315(c)-(f). As the FCC apparently recognizes, there is no statutory anchor for any such duty. But neither is there any textual basis—in section 251(c)(3) or elsewhere—for requiring an incumbent to provide preassembled packages of elements for a competitor merely because the incumbent happens to have combined the elements for its own use.

Nor does the FCC gain anything by engaging in word games about the "rights" and "duties" created by section 251(c)(3). The FCC argues (FCC Br. 45) that the Eighth Circuit erred in concluding that an incumbent's "duty to provide" network elements under section 251(c)(3) "encompasses a *right* . . . to disconnect those elements." According to the FCC, since "a 'duty' is an obligation, not a right, . . . the grammatical implication of the Eighth Circuit's construction . . . is that incumbent LECs *must* provide access to network elements, including shared facilities, only on a *disconnected* basis." FCC Br. 45-46 (emphasis in original); *see* AT&T Br. 46.

That analysis simply misreads the Eighth Circuit's opinion. The court of appeals' understanding of section 251(c)(3) does not give incumbents any "rights"; it simply limits the *scope* of an incumbent's "duty" in accordance with the plain text of the statute. The incumbent's duty under the statute is to provide elements in a way that allows "requesting carrier[s]" to "combine" them—no more and no less.

The FCC also errs in contending that it would somehow constitute "discrimination" for an incumbent to provide network elements on a separated basis to new en-

trants when those elements are already combined in its own network. *See* FCC Br. 46. As an initial matter, any understanding of what constitutes "discrimination" under section 251(c)(3) must take account of the rest of section 251(c)(3). And it cannot be that Congress understood it to be "discriminatory" for an incumbent to do just what section 251(c)(3) expressly requires of it—provide network elements in a manner that allows a new entrant to combine them.

In any event, the FCC's argument rests on the false premise that incumbents, unlike entrants, are not required to combine network elements. *See* FCC Br. 46. Existing network element combinations do not materialize spontaneously out of nowhere. For a combination of facilities to exist, the incumbent must have invested the time and effort to combine the constituent elements. And where a new customer seeks local telephone service, the incumbent must create the connections needed to provide service to that customer, just as a new entrant would be required to do. Accordingly, MCI is wrong in stating that the vacated FCC rule "simply placed the potential competitor in the same position as the incumbent." MCI Br. 15. Just the opposite is true: the FCC's rule gave new entrants an artificial and unjustified advantage. By vacating the FCC's rule, the Eighth Circuit ensured that competitors and incumbents would bear the same burdens and that neither would have an inherent cost advantage or disadvantage.

Finally, there is no substance to the FCC's attempt to prove that network elements must be combined by focusing on the characteristics of one particular network element, a "signalling system." According to the FCC, it is not technically feasible to "disconnect[]" that element, so a new entrant could not be expected to undertake the work necessary to combine signaling with other network elements. FCC Br. 45. But the signaling system example supports our argument, not the FCC's. In particular, because a switch cannot be separated from the signaling

associated with it, the FCC's rules consider signaling and switching to be part of the *same* element for these purposes, *not* two inseparable elements. *See* 47 C.F.R. § 51.319(c)(1)(i)(C)(*2*). On the other hand, because signaling *can* be provided without switching, a competitor may obtain that item separately and, in that context, must obtain access to the incumbent's network to make a physical connection between the incumbent's signaling system and the competitor's own network. *See* J.A. —— (¶ 483) ("Carriers that provide their own switching facilities should be able to access the incumbent LEC's [signaling] network for each of their switches via a signaling link between their switch and the incumbent LEC's [network] . . . . This could be accomplished by the incumbent providing an unbundled signaling link from its [network] to the competitor's switch . . . .").

**b.** Even if we—and the Eighth Circuit—were wrong about the evident meaning of the statutory directive that incumbents are to provide elements in a manner that allows "requesting carriers to combine such elements," the statute still would not allow competitors to obtain a "platform" containing *all* the pre-combined elements necessary to provide service.

First, the language of the individual provisions governing network elements is clear that unbundled elements may be purchased only by a competitor with at least some network facilities of its own. Thus, section 251(c)(3) states—in language that MCI (MCI Br. 14-15) and the FCC (FCC Br. 43-44) conspicuously omit from their recitations of the statute—that the incumbent's duty is to provide "access" to network elements at a "technically feasible point." Those terms plainly contemplate a physical interconnection of networks that allows the new entrant to incorporate portions of the incumbent's network. *See* S. Rep. No. 104-23, at 20 (describing "unbundled access" as a form of physical access needed to ensure "the interoperability of *both carriers' networks*") (emphasis added). The reference to providing "access" at a "point"

makes clear that competitors will receive access at a physical place in the world. And that conclusion is further reinforced by the fact that the "point" of "access" must be "technically feasible," a restriction that makes sense *only* if the statute requires a new entrant to make a physical connection.[21]

Indeed, outside of litigation, the FCC itself has recognized that the statutory reference to "technical feasibility" necessarily assumes *physical* access to the incumbent's network: "We conclude that the term 'technically feasible' refers solely to technical or operational concerns. . . . We further conclude that the obligations imposed by sections 251(c)(2) and 251(c)(3) include modifications to incumbent LEC facilities to the extent necessary to accommodate interconnection or access to network elements." J.A. 507-08 (¶ 198).

The evident meaning of section 251(c)(3) is also strongly fortified by the language of related statutory provisions. In particular, under the 1996 Act, incumbents must permit "physical collocation"—that is, installation of a competitor's equipment on the incumbent's premises—"for interconnection or access to unbundled network elements." 47 U.S.C. § 251(c)(6). Congress would have had no need to require physical collocation for this pur-

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[21] Of all the petitioners, only AT&T even mentions this language. It argues that because the statute provides for access to "elements" at a single "point," Congress must have anticipated that elements would be provided in combination. AT&T Br. 38. But of course that argument does not dispute the basic point made in text that the entrant must have some sort of network to interconnect with the incumbent in order to obtain those elements. Thus, the entrant cannot simply buy all the elements from the incumbent; otherwise, there is no point at which two networks interconnect. As for AT&T's attempt to wring significance out of the plural "elements" and the singular "point" in that sentence, its theory doesn't work. An entrant can obtain multiple physically separated elements at a single point—typically, the "collocation cage" that it places in an incumbent's central office precisely to permit "access to unbundled network elements at the premises of the local exchange carrier." 47 U.S.C. § 251(c)(6).

pose if, as the FCC asserts, entrants would never actually be required to enter onto the incumbent's premises to connect equipment.

This notion of a physical interconnection—a technically feasible point of access—between networks is fundamentally incompatible with a system that allows the new entrant to order from the incumbent everything it needs for a finished service. If the new entrant can order a complete "platform" of network elements, then it has no network to interconnect with that of the incumbent. The only connection between the new entrant and the incumbent is a phone call to order the platform.

Indeed, even under the FCC's own argument, access to all the pre-combined elements needed to provide service is not "unbundling." In the prior decisions on which the FCC has relied, the fundamental issue was whether one part of the network could be physically "unplugged" from the rest of the incumbent's facilities and separately priced so that other companies could compete to provide just that single piece of the network (for example, customer premises equipment or inside wiring). *See, e.g., Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, 77 F.C.C.2d 384 (1980); *Detariffing the Installation and Maintenance of Inside Wiring*, 59 Rad. Reg.2d 1143 (1986).

The "platform" approach sanctioned by the FCC turns that understanding of "unbundling" on its head. What is at issue in this case is *not* whether the network may be physically subdivided into separately priced parts so that competitors who have their own facilities (*e.g.*, their own customer premises equipment) may use those facilities to compete in the market for that network subpart. Rather, it is whether competitors who have no facilities of their own may pay a *single* price to obtain pre-combined packages of all the elements needed to reproduce the *complete* service the incumbent currently provides at retail. The FCC's prior decisions are thus directly contrary to the theory that access to such a preassembled platform may

be understood as "unbundling"—and, even more clearly, they do nothing to buttress the truly extraordinary claim, made by AT&T and MCI, that those companies may obtain all those pre-combined elements at rates that, when added together, are *below* the price at which, by statute, they may obtain the complete service.

In fact, contrary to the FCC's new-found theory, access to pre-assembled platforms has always been understood to be just what it is—resale. And that brings us to our last key point.

Congress enacted specific limitations on the use of resale, and the Commission cannot allow those restrictions to be evaded by entrants engaging in the exact equivalent of resale under another name. "[A] statute is to be considered in all its parts" (*Lexecon Inc. v. Milberg Weiss Bershad Hines & Lerach*, 118 S. Ct. 956, 962 (1998)), and a conclusion that renders important statutory limitations meaningless cannot stand. *See Colautti v. Franklin*, 439 U.S. 379, 392 (1979) (relying on the "elementary canon of construction that a statute should be interpreted so as not to render one part inoperative"); *Bennett v. Spear*, 117 S. Ct. 1154, 1166 (1997) (rejecting an interpretation that "emasculate[s] an entire section" of a statute) (internal quotation marks omitted). Thus, the FCC's attempt to allow competitors to construct an entire fictional network under the guise of purchasing unbundled network elements is contrary not only to the language of the specific provisions governing unbundling, but also to the basic statutory distinction between resale and access to unbundled network elements. As one facilities-based competitor has explained, "the careful balance crafted by Congress would be upset . . . if local entrants could undermine the comprehensive scheme of the Act by manipulating the provisions of Sections 251(c)(3) and 252(d)(1) to acquire complete services as platforms of network elements, and to have those services priced at cost rather than at wholesale rates as required by Sections

251(c)(4) and 252(d)(3)."[32] This view was echoed by a group of the key legislators who actually wrote the 1996 Act.[33]

For these reasons, this fundamental flaw in the FCC's rules cannot be brushed aside as a mere "policy concern." FCC Br. 47. The problem with the FCC's position is not simply that it is inconsistent with what the agency *concedes* are important statutory policies, such as encouraging facilities-based competition—though that is assuredly a significant problem. It is also, and more fundamentally, that the FCC's conclusion is inconsistent with the separate statutory treatment accorded resale and unbundling.

Our argument, therefore, is *not* that, as a matter of policy, the FCC should artificially make the use of unbundled elements a "less attractive entry option." FCC Br. 47. Rather, we contend that the FCC's rules must make the use of both resale and unbundled elements *only as attractive as Congress intended them to be.* And the FCC has no discretion at all to promulgate rules that disregard the limitations that the 1996 Act imposes on those entry vehicles; such rules are fundamentally inconsistent with the scheme Congress enacted into law. *See, e.g., Maislin Indus. v. Primary Steel, Inc.*, 497 U.S. 116, 131 (1990) (declining to defer to agency interpretation that was "flatly inconsistent with the statutory scheme as a whole"); *Dole v. United Steelworkers*, 494 U.S. 26, 41 (1990) (agency interpretation rejected "in light of language and structure of the Act as a whole").

In fact, the FCC itself has recognized that a reading of the statute that makes the use of unbundled elements interchangeable with resale—and thus nullifies the statutory resale restrictions—is insupportable. Accordingly, it has attempted to show that there is some real difference between resale and access to *all* the pre-combined network

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[32] Time Warner Communications Mem. in Support of Petitions for Rehearing, at 3 (8th Cir. No. 96-3321, filed Oct. 1, 1997).

[33] *See* Brief of Amici Curiae the Honorable John D. Dingell, *et al.*, at 12-18 (8th Cir. No. 96-3321, filed Nov. 15, 1996).

elements needed to provide a service. In its First Report and Order, the Commission asserted that a carrier using unbundled elements confronts unique competitive perils. Unlike a reseller, such a carrier allegedly must make an up-front investment and thus "faces the risk that end-user customers will not demand a sufficient number of services using that facility for the carrier to recoup its costs." J.A. 573-74 (¶ 334); *see also* FCC Br. 47.

That is simply wrong. Under the FCC's own view of the 1996 Act, competitors are *not* required to make any up-front investment. Generally speaking, local telephone networks can be divided into three segments: (1) the local loop, which connects an individual customer to a central telephone switch; (2) the switch, which directs calls to their destination; and (3) the trunk connections between switching centers (and thus their associated loops), which transport calls that originate and terminate in areas served by different switches. With respect to switching and trunks, the FCC has squarely held that competitors may order whatever quantities they need to meet customer demand, even if that requires shared use of particular facilities.[34] According to the Commission, a competitor may demand that the incumbent's switch and transport facilities be "*priced on an actual usage basis*"—in other words, the competitor need make no up-front investment and need bear no risk of demand fluctuations.[35] Similarly, a competitor need make no up-front investment in loops, which are purchased individually when a customer switches providers.[36]

The FCC argued before the court of appeals that, even if considerations of investment risk would not lead a competitor to choose resale over unbundled elements, a competitor might do so with respect to some customers for

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[34] *See* J.A. 1384-85 (Third Order on Reconsideration, ¶¶ 43-44).

[35] Response of Federal Respondents to Petitions for Rehearing, at 12 (8th Cir. No. 96-3321, filed Oct. 1, 1997) (emphasis added).

[36] *Id.* at 13.

whom the State has set retail rates at artificially low levels to promote universal service. FCC Rehearing Response, *supra* note 35, at 13. The FCC explained that, when retail rates are low relative to costs, "the 'retail less avoided cost' standard of section 252(d)(3) will allow a new entrant to compete via resale, while access to unbundled elements at rates 'based on the cost' of those elements likely will not." *Id.*

But that, of course, is precisely the point. The FCC's rules would allow new entrants to engage in regulatory arbitrage—invoking the resale pricing rules when those are advantageous, and the network element rules when those are advantageous—without any substantive difference in the service provided, the work done, or the new entrant's up-front investment. The fact that the resale provisions of section 251(c)(4) provide a more favorable path for potential competitors in some instances does not justify creating a new extra-statutory pricing regime to address other situations in which end-to-end use of network elements is more expedient.

**4.** The FCC and its supporting petitioners ultimately seek shelter in policy arguments of their own. AT&T argues, for instance, that preassembled "combinations of network elements . . . are particularly critical for providing competition for residential service" and that "the Eighth Circuit's decision . . . 'effectively has killed off local competition' in much of the local market." AT&T Br. 37 (internal citation omitted).

All the Eighth Circuit has "killed off," however, is the ability of companies to do something Congress never intended—make a quick buck by gaming the regulatory system without investing in any facilities and without supporting universal service. The Eighth Circuit has done nothing to hinder competition by companies that seek to engage in real facilities-based competition.[37] For that rea-

[37] Nor has it done anything to prevent resale by companies that do not object to following the rules that Congress enacted into law. Indeed, the FCC's Chairman recently emphasized that resale is

son, many of those companies have cheered the Eighth Circuit's ruling. As one competitor stated, the Eighth Circuit "made the right decision": those demanding that incumbents provide fully preassembled sets of network elements are part of a "rear-guard action being fought by the big long distance carriers to essentially get in there and not have to make any investment." [38] Another facilities-based competitor echoed the point: true local competitors "owe[] a debt of gratitude to the Eighth Circuit. . . . The fact that there will be no free ride for interexchange carriers seeking a cheap method of local market entry is a plus for our industry." [39] Those competitors have also made clear that the result advocated by the FCC in this case would undermine facilities-based competition because "[i]f a competing carrier can obtain an entire platform at incremental cost that effectively replaces a tariffed service, it will have no incentive to invest in deploying its own facilities in the local network." [40]

By the same token, AT&T's and MCI's overheated rhetoric about incumbents gratuitously "ripping apart" their own networks is at best disingenuous. The 1996 Act itself requires incumbents to separate their networks into piece-parts so that new entrants may obtain access to those

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"economically viable." *Kennard Targets Phone, Cable Competition in 'Very Ambitious' Agenda*, Communications Daily (Feb. 2, 1998). *See also* Krause, *Computers & Technology: Kennard's Call Is Implementing Telecom Reform*, Investor's Business Daily (Feb. 18, 1998) ("Yes, I'm aware that the large (long-distance carriers) have backed away from a resale strategy. But some smaller CLECs (competitive local exchange carriers) haven't backed away from resale, and it seems to be viable for some new entrants") (statement of Chairman Kennard).

[38] *CLECs Revenue and Market Share Predicted to Grow 60% Next Year*, Communications Daily, at 2 (Dec. 10, 1997) (quoting Royce Holland, Chairman of Allegiance Telecom).

[39] Telecommunications Reports, at 18 (Nov. 10, 1997) (quoting James Allen, CEO of Brooks Fiber Properties, Inc.).

[40] Reply Comments of Intermedia Communications, Case No. 97-C-1963, at 5 (N.Y. P.S.C. Dec. 12, 1997).

parts. But, ever since Congress passed the 1996 Act, AT&T and MCI have sought at every turn to transform that straightforward statutory requirement into something it plainly is not—a duty to provide access to complete finished services. It should be no surprise that such an attempt to misuse the statutory scheme has run into significant difficulties that derive directly from the text of the 1996 Act itself. Nor is there anything improper about the incumbents' insisting upon strict adherence to that statutory text to forestall massive losses resulting not from genuine competition, but from illegitimate regulatory arbitrage.

### B. The FCC's View of the Network Elements That Incumbents Must Make Available Is Contrary to the Act's Language, Structure, and Policy.

Having allowed new entrants to use an incumbent's network elements in a way that Congress never intended, the FCC then compounded the problem by expanding the number of such elements that incumbents must provide. The Commission did so in several ways, none of which is consistent with the 1996 Act.

**1.** First, the FCC nullified the statutory directive that, in determining what elements an incumbent must make available, the FCC "shall consider, at a minimum," whether access to proprietary network elements is "necessary," and whether the failure to provide access to other network elements would "impair" the ability of the requesting carriers to provide service. 47 U.S.C. § 251(d)(2). That provision reflects Congress's recognition that access to an unbundled network element is economically justified only when a new entrant has a genuine need for such an element. As AT&T itself explained in its opening brief, the effect of these provisions was to "allow new entrants to obtain *essential facilities* that a LEC controls." AT&T Br. 2 (emphasis added).

The FCC disregarded Congress's direction. The Commission determined that the "necessary" and "impair" standards required no consideration of "whether a request-

ing carrier could obtain the desired elements from an alternative source"; the only proper inquiry, in the FCC's view, is whether the equivalent functionality can be obtained elsewhere in *the incumbent's own network*. *See* J.A. 547, 549 (¶¶ 283, 287). In other words, the only situation in which a new entrant is *not* entitled to an incumbent's network element is when *some other* element in the incumbent's network can perform the same function. *See id.*

That astonishing conclusion defies the plain meaning of the 1996 Act. Access to a proprietary element from an incumbent simply cannot be "necessary," and failure to provide an element cannot "impair" a new entrant's ability to provide service, if an equivalent element is readily available from a source other than the incumbent. Yet, under the blinkered inquiry required by the FCC's rules, a particular facility may be available from dozens of suppliers at competitive prices, but access may nevertheless be deemed "necessary" for an entrant to provide service.

That is an irrational result, and it is not the one Congress enacted into law. On the contrary, as noted above, by mandating an evaluation of the actual need for an element—under the necessity and impairment standards—Congress expressed its preference that new entrants rely on non-incumbent facilities where possible, in order to promote facilities-based competition and encourage innovation. After all, it is precisely where the new entrant can avail itself of facilities other than the incumbent's that the potential for true facilities-based competition is greatest. And, contrary to the Eighth Circuit's apparent belief, that does not mean that access to elements is not required whenever an "element[] could theoretically be duplicated eventually." Pet. App. 47a-48a. It simply means that *some* inquiry into actual market conditions should be made before the incumbent is conscripted into providing its competitors with access to its network equipment.

Indeed, it is hornbook antitrust law that "essential facilities" must be made available to competitors only if they are not *"available from another source or capable of being duplicated by the* [*competitor*] *or others.*" 3A Areeda &

Hovenkamp, ¶ 773b, at 202 (1996) (emphasis added). The lower courts have repeatedly held that a prerequisite for access to an essential facility is a showing of the "competitor's inability practically or reasonably to duplicate" that facility. *MCI Communications Corp. v. AT&T*, 708 F.2d 1081, 1132-33 (7th Cir.), *cert. denied*, 464 U.S. 891 (1983).[41] The reason for that rule is straightforward, and it is fully applicable here. When the government "order[s] the [owner] to provide the facility and regulat[es] the price to competitive levels, then the [prospective entrant's] incentive to build an alternative facility is destroyed altogether." 3A Areeda & Hovenkamp, ¶ 771b, at 175. To protect against precisely that danger, Congress required an inquiry into "necessity" and "impairment" before the FCC could force incumbents to offer access to their network elements. By ignoring those statutory standards, the FCC created the very result—loss of any incentive to build facilities—that courts have scrupulously guarded against in antitrust cases.

The FCC's rule is particularly troublesome in the context of proprietary elements. Congress required the Commission to apply strict standards to the unbundling of such elements because it understood that no incumbent will invest in research and development if innovations must automatically be turned over to the incumbent's competitors. *See, e.g., Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 480 (1974) (right of exclusivity provides "an incentive to inventors to risk the often enormous costs in terms of time, research, and development"). But, under the FCC's rules, an incumbent can be required, after investing millions of dollars in developing a new service or feature, to turn that service or feature over to its competitors at

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[41] *Accord Twin Labs, Inc. v. Weider Health & Fitness*, 900 F.2d 566, 568 (2d Cir. 1990); *Ideal Dairy Farms, Inc. v. John Labatt, Ltd.*, 90 F.3d 737, 748 (3d Cir. 1996); *Laurel Sand & Gravel, Inc. v. CSX Trans., Inc.*, 924 F.2d 539, 544 (4th Cir. 1991); *City of Malden v. Union Elec. Co.*, 887 F.2d 157, 160 (8th Cir. 1989); *City of Anaheim v. Southern Calif. Edison Co.*, 955 F.2d 1373, 1379-80 (9th Cir. 1992).

forward-looking cost regardless of whether those competitors can obtain its equivalent elsewhere. That rule will quite obviously provide a significant disincentive to research and development by incumbents. Indeed, the FCC has admitted as much. See J.A. 546-47 (¶ 282) ("prohibiting incumbents from refusing access to proprietary elements could reduce their incentives to offer innovative services"). That result cannot be squared with the statutory text, and it should be reversed.

**2.** Having created a rule under which competitors are entitled to obtain just about anything deemed to be a "network element," the FCC then construed the term "network element" to encompass virtually every asset an incumbent owns. As a result, the FCC's unbundling rules require an incumbent to turn over to competitors essentially its entire business.

The Act defines a network element as a "*facility or equipment* used in the provision of a telecommunications service," as well as "features, functions, and capabilities that are provided *by means of such facility or equipment*, including subscriber numbers, databases, signaling systems, and information sufficient for billing and collection or used in the transmission, routing, or other provision of a telecommunications service." 47 U.S.C. § 153(29) (emphasis added). Thus, the concept of network elements under the Act is rooted in discrete *physical* facilities carriers use in providing local exchange service and "features" that may be made available "by means of" such facilities.

The Act's definition of a "network element" therefore reflects the basic purpose of the unbundling provisions—to give entrants access to those essential physical facilities they need to provide telecommunications service but could not reasonably duplicate, at least in the short term. At the same time, the term "network element" does not encompass aspects of an incumbent's business that Congress had no reason to believe could not be duplicated, such as back-office billing or other support functions that any new competitor could reasonably perform for itself.

The FCC, however, defined "network element" so broadly that it effectively permits competitors to make use of every part—both physical and non-physical—of an incumbent's business. Several such rulings are at issue here.

**a.** First, the FCC's order requires incumbent carriers to unbundle their operational support systems (or "OSS"). 47 C.F.R. § 51.319(f). These support systems consist of computer software that serves a number of functions relating to an incumbent's customer service operations, such as processing customer orders and routing customer requests to the right person in the company.

These systems are not "network elements" within the meaning of the statute. They are neither "a facility or equipment" used in the provision of "a telecommunications service"—that is, used in the "routing" or "transmission" of telephone calls—nor "features . . . provided *by means of* such facility or equipment." 47 U.S.C. § 153(29), (43), (46) (emphasis added). Rather, as their name suggests, they are *support* systems that an incumbent uses to run its business—to process orders, to dispatch repair personnel, to keep track of customer service requests. Requiring an incumbent to make these systems available to competitors has nothing to do with unbundling the pieces of the network actually used to deliver calls. As a result, the plain terms of the definition in the Act simply do not reach these software systems.

Indeed, the FCC does not even attempt to characterize these support systems as part of the equipment used to route or transmit a call. Rather, the FCC has made clear that its objective in unbundling support systems is to ensure that new entrants will be able to perform *business* functions such as "pre-ordering, ordering, . . . and billing" and "basic service functions [such] as scheduling customer appointments" in "substantially the same time and manner that an incumbent can for itself." J.A. 670-71 (¶ 518). But nothing in Congress's definition of network elements suggests that the incumbents' business skills, in contrast to portions of their physical networks, must be turned over to competitors. On the contrary, Congress specifically tied

the unbundling requirement to the physical "features and equipment" owned by the incumbent.

Nor can incumbents be required to provide these back-office support systems on the Eighth Circuit's theory that, since a "telecommunications service" is the "offering of telecommunications for a fee directly to the public" (47 U.S.C. § 153(46)), a facility is "used" in providing a "telecommunications service" any time it assists in the overall "commercial offering of telecommunications." Pet. App. 42a-43a. Under that principle, *any* asset that might be useful in running a telecommunications company—desks, repair trucks, office space—could be requisitioned by a competitor. But no one has seriously suggested that Congress intended any such result. And the statute's definition of "telecommunications"—which encompasses only the *physical* "transmission, between or among points specified by the user, of information of the user's choosing" (47 U.S.C. § 153(43))—is incompatible with the Eighth Circuit's expansive theory. Operational support systems—like desks, trucks, and office space—having nothing to do with the transmission of calls, and they therefore cannot qualify as "network elements" under any reasonable reading of the statutory terms.

**b.** The FCC also erred in deciding that *services* offered by incumbent LECs, such as operator services and directory assistance, should be treated as "elements" subject to unbundling. *See* J.A. 678-81 (¶¶ 534-540); 47 C.F.R. § 51.319(g). These services do not fall within the definition of "network elements": they are not a "facility or equipment" in the telephone transmission network; neither are they "features, functions, [or] capabilities . . . provided by means of" such facilities. 47 U.S.C. § 153(29). In fact, although the unbundling provision of the House bill originally applied to "*services*, elements, features, functions, and capabilities," the Conference Committee chose to eliminate the term "services" when it defined the scope of unbundling. H.R. 1555, § 242(a)(2) (emphasis added). The FCC improperly reversed Congress's decision in favor of its own policy preferences.

Straining to find a textual hook for its illegitimate stretching of the term "network element," the FCC asserted that operator services and directory assistance qualify as "*information* . . . used in the transmission, routing, or *other provision* of a telecommunications service." 47 U.S.C. § 153(29) (emphasis added). According to the Commission, the concluding phrase "other provision" expands the category of network elements to include any information related to the provision of telecommunications services. J.A. 537-38 (¶ 261).

Under established principles, however, that phrase must be understood in light of the company it keeps. When a general term such as "other provision" is tacked on at the end of a list, it is properly understood as limited by the more specific terms that precede it. *See, e.g., Hughey v. United States*, 495 U.S. 411, 419 (1990) ("general statutory term should be understood in light of the specific terms that surround it"); *Federal Maritime Comm'n v. Seatrain Lines, Inc.*, 411 U.S. 726, 734 (1973) ("catchall provision" is to be "read as bringing within a statute categories similar in type to those specifically enumerated"). Here, the other elements of the list—"transmission" and "routing"—are functions used in the physical delivery of calls, and nothing in the statute suggests that the reference to "other provision" should expand that definition so broadly that it includes essentially all assets owned by a company that provides telephone service.

The full absurdity of the Commission's theory is illustrated by its insistence that even such optional, discretionary services as Caller ID and Call Waiting must be treated as "network elements." All parties agree that these so-called "vertical services" are retail services that incumbents currently sell to their customers and that therefore must be made available at the statutory wholesale discount. But under the FCC's rules, new entrants may *also* obtain access to these same vertical services as network elements at cost-based rates—and may do so despite the incontestable fact that these services do not route, transmit, or oth-

erwise play a role in the physical delivery of a telephone call.

Congress had no reason to require incumbents to make the same service available at two different prices, and it did not do so. Indeed, adherence to the statutory resale rules is particularly important in the context of these services because, as with business services, State commissions typically set retail prices for vertical services at above-cost rates to support low prices for other services. Allowing competitors to obtain the same services at the cost-based rates reserved for true network elements would simply invite them to engage in yet another form of regulatory arbitrage. Congress intended no such result—indeed, as noted, it affirmatively decided to exclude "services" from the definition of network elements. And because an asset can qualify as a network element only if it is "*used* in the provision of a telecommunications service," it makes no sense at all to say that a telecommunications service is *itself* a network element.

## III. THE FCC'S "PICK-AND-CHOOSE" RULE IS INCOMPATIBLE WITH THE ACT'S SCHEME OF PRIVATE NEGOTIATIONS AND BINDING AGREEMENTS.

The FCC's order precludes effective negotiation of binding agreements by allowing new entrants "to choose among individual provisions contained in publicly filed interconnection agreements" that the incumbent carriers have reached with other carriers. J.A. 1044-45 (¶ 1310). Competitors may poach "any individual interconnection, service, or network element arrangement contained in any agreement to which [the incumbent] is a party." 47 C.F.R. § 51.809(a) (emphasis added). Moreover, the competitor need not enter into renegotiations that would give the incumbent a chance to rebalance the relationship to take account of the terms imported from other agreements. Rather, the order lets the competitor bypass the statutory negotiations *entirely* and demand that a State regulator award it any term agreed to by others. J.A. 1048 (¶ 1321). In effect, the FCC transformed a negotiated agreement into a series of tariff provisions from which competitors

can pick and choose at will. The Eighth Circuit correctly set this rule aside as incompatible with the statutory structure.

Section 252(i), on which the FCC relies, requires nothing remotely like this bizarre rule. It provides only that an incumbent LEC "shall make available" in the negotiating process "any interconnection, service, or network element" that it provides under an approved agreement with any other carrier "*upon the same terms and conditions* as those provided in the agreement." 47 U.S.C. § 252(i) (emphasis added). This provision establishes a straightforward nondiscrimination principle that requires an incumbent LEC to put on the bargaining table for negotiation any item contained in another agreement, but *only* on the same terms and conditions—embodying all the same tradeoffs—that appear in that other agreement. This requirement ensures that a LEC cannot restrict a particular service to a specific carrier and that a second entrant can step into the shoes of an earlier one if it wishes to accept the deal that the earlier one has struck. It certainly does *not* mean that a second entrant can take what it likes from a prior agreement and leave behind what it doesn't like.[42]

Moreover, any agreements that *are* concluded under the FCC's "pick-and-choose" rule are not binding. A competitor may demand for itself a new term from another agreement at *any* time, even after it has already signed a contract with an incumbent agreeing to a full package of terms and conditions. *See* J.A. 1046-47 (¶ 1316). As this Court has recognized, a contract that gives one party unfettered discretion " 'to deny or change the effect of the promise[] is an absurdity.' " *United States Trust Co. v. New Jersey*, 431 U.S. 1, 25 n.23 (1977) (quoting *Murray v. Charleston*, 96 U.S. 432, 445 (1878)).

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[42] The FCC's suggestion that this reading of the statute would encourage incumbents to lard an interconnection agreement with unrelated terms (FCC Br. 49-50) ignores the fact that any agreement must be approved by a State commission. 47 U.S.C. § 252(e). State commissions are amply equipped to reject any attempt to import such unrelated terms into an agreement.

The FCC's radical pick-and-choose regulation cannot be reconciled with a statutory scheme that relies on bilateral commercial negotiations to establish "binding agreement[s]." 47 U.S.C. § 252(a)(1). Bargaining is impossible where one party remains free to avoid its promises by selecting new contract terms at will, and where the other party cannot know the extent of its commitments because it cannot know who else in the future will demand the concessions it makes in a contract without agreeing to the same tradeoffs.

Pick-and-choose also distorts the *content* of interconnection arrangements. A complex commercial agreement is an integrated whole whose terms reflect the give and take of bargaining. Generally, each party makes concessions in some areas in exchange for benefits in others, reflecting the particular needs and priorities of the parties. A party might, for example, agree to a higher price for one service in exchange for a lower price for another. But pick-and-choose allows one side (the entrant) to demand the *quid* (the lower price on the first service) without having to take the *quo* (the higher price on the other) with which it was originally paired—regardless of differences in context or in the commercial assumptions on which each bilateral arrangement is based. Given this prospect, the incumbent simply cannot afford to make tradeoffs, and a negotiated agreement that would otherwise benefit the negotiating parties will not be reached.[43]

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[43] AT&T suggests that the FCC rule does not permit a competitor to take the *quid* without the *quo* where the tradeoff is "legitimate" and "express[]." AT&T Br. 50. But the FCC has never defended its rule on this ground. Moreover, that interpretation ignores the reality that complex commercial agreements involving multiple services must be viewed as a whole—one party may accept a tradeoff that it believes to be somewhat disadvantageous because another tradeoff embodied in the agreement is particularly advantageous. And forcing an incumbent to disclose this type of detailed analysis during negotiations in order to be able to prove later that particular terms were "expressly" linked and that such a link is "legitimate" would have its own chilling effect on negotiations.

In short, the FCC's pick-and-choose rule conflicts with the terms and structure of the Act and impermissibly thwarts the statute's reliance on negotiated, binding agreements. This Court should affirm the Eighth Circuit's decision to vacate the rule as unlawful.

## CONCLUSION

Both judgments of the court of appeals should be affirmed insofar as they vacate the rules and order paragraphs specified in the court's opinions. *See* Pet. App. 66a & n.39, 71a-72a, 91a. The judgment of the court of appeals in the lead case below should be reversed insofar as it upheld the FCC's rules (1) permitting competitors to lease all of an incumbent's network elements needed to replicate a service provided by the incumbent; (2) nullifying the statute's "necessary" and "impair" standards; and (3) impermissibly expanding the definition of "network elements" to include operations support systems, operator services, directory assistance, and "vertical services."

Respectfully submitted,

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# ADDENDUM

## STATUTORY ADDENDUM
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## STATUTORY PROVISIONS

### § 152. Application of chapter

#### (a) Applicability to interstate and foreign communications or transmissions of energy originating in or received within the United States by wire or radio; Canal Zone exception; cable services

The provisions of this chapter shall apply to all interstate and foreign communication by wire or radio and all interstate and foreign transmission of energy by radio, which originates and/or is received within the United States, and to all persons engaged within the United States, in such communication or such transmission of energy by radio, and to the licensing and regulating of all radio stations as hereinafter provided; but it shall not apply to persons engaged in wire or radio communication or transmission in the Canal Zone, or to wire or radio communication or transmission wholly within the Canal Zone. The provisions of this chapter shall apply with respect to cable service, to all persons engaged within the United States in providing such service, and to the facilities of cable operators which relate to such service, as provided in subchapter V-A of this chapter.

#### (b) Exceptions to Federal Communications Commission jurisdiction

Except as provided in sections 223 through 227 of this title, inclusive, and section 332 of this title, and subject to the provisions of section 301 of this title and subchapter V-A of this chapter, nothing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier, or (2) any carrier engaged in interstate or foreign communication solely through physical connection with the facilities of another carrier not directly

or indirectly controlling or controlled by, or under direct or indirect common control with such carrier, or (3) any carrier engaged in interstate or foreign communication solely through connection by radio, or by wire and radio, with facilities, located in an adjoining State or in Canada or Mexico (where they adjoin the State in which the carrier is doing business), of another carrier not directly or indirectly controlling or controlled by, or under direct or indirect common control with such carrier, or (4) any carrier to which clause (2) or clause (3) of this subsection would be applicable except for furnishing interstate mobile radio communication service or radio communication service to mobile stations on land vehicles in Canada or Mexico; except that sections 201 to 205 of this title shall, except as otherwise provided therein, apply to carriers described in clauses (2), (3), and (4) of this subsection.

**§ 153. Definitions**

* * * *

**(29) Network element**

The term "network element" means a facility or equipment used in the provision of a telecommunications service. Such term also includes features, functions, and capabilities that are provided by means of such facility or equipment, including subscriber numbers, databases, signaling systems, and information sufficient for billing and collection or used in the transmission, routing, or other provision of a telecommunications service.

* * * *

**(43) Telecommunications**

The term "telecommunications" means the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received.

* * * *

**(46) Telecommunications service**

The term "telecommunications service" means the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.

**(47) Telephone exchange service**

The term "telephone exchange service" means (A) service within a telephone exchange, or within a connected system of telephone exchanges within the same exchange area operated to furnish to subscribers intercommunicating service of the character ordinarily furnished by a single exchange, and which is

covered by the exchange service charge, or (B) comparable service provided through a system of switches, transmission equipment, or other facilities (or combination thereof) by which a subscriber can originate and terminate a telecommunications service.

**(48) Telephone toll service**

The term "telephone toll service" means telephone service between stations in different exchange areas for which there is made a separate charge not included in contracts with subscribers for exchange service.

* * * *

**(52) Wire communication**

The term "wire communication" or "communication by wire" means the transmission of writing, signs, signals, pictures, and sounds of all kinds by aid of wire, cable, or other like connection between the points of origin and reception of such transmission, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission.

* * * *

## § 220. Accounts, records, and memoranda

### (a) Forms

(1) The Commission may, in its discretion, prescribe the forms of any and all accounts, records, and memoranda to be kept by carriers subject to this chapter, including the accounts, records, and memoranda of the movement of traffic, as well as of the receipts and expenditures of moneys.

(2) The Commission shall, by rule, prescribe a uniform system of accounts for use by telephone companies. Such uniform system shall require that each common carrier shall maintain a system of accounting methods, procedures, and techniques (including accounts and supporting records and memoranda) which shall ensure a proper allocation of all costs to and among telecommunications services, facilities, and products (and to and among classes of such services, facilities, and products) which are developed, manufactured, or offered by such common carrier.

### (b) Depreciation charges

The Commission may prescribe, for such carriers as it determines to be appropriate, the classes of property for which depreciation charges may be properly included under operating expenses, and the percentages of depreciation which shall be charged with respect to each of such classes of property, classifying the carriers as it may deem proper for this purpose. The Commission may, when it deems necessary, modify the classes and percentages so prescribed. Such carriers shall not, after the Commission has prescribed the classes of property for which depreciation charges may be included, charge to operating expenses any depreciation charges on classes of property other than those prescribed by the Commission, or, after the Commission has prescribed percentages of depreciation, charge

with respect to any class of property a percentage of depreciation other than that prescribed therefor by the Commission. No such carrier shall in any case include in any form under its operating or other expenses any depreciation or other charge or expenditure included elsewhere as a depreciation charge or otherwise under its operating or other expenses.

**(c) Access to information; burden of proof**

The Commission shall at all times have access to and the right of inspection and examination of all accounts, records, and memoranda, including all documents, papers, and correspondence now or hereafter existing, and kept or required to be kept by such carriers, and the provisions of this section respecting the preservation and destruction of books, papers, and documents shall apply thereto. The burden of proof to justify every accounting entry questioned by the Commission shall be on the person making, authorizing, or requiring such entry and the Commission may suspend a charge or credit pending submission of proof by such person. Any provision of law prohibiting the disclosure of the contents of messages or communications shall not be deemed to prohibit the disclosure of any matter in accordance with the provisions of this section. The Commission may obtain the services of any person licensed to provide public accounting services under the law of any State to assist with, or conduct, audits under this section. While so employed or engaged in conducting an audit for the Commission under this section, any such person shall have the powers granted the Commission under this subsection and shall be subject to subsection (f) of this section in the same manner as if that person were an employee of the Commission.

**(d) Penalty for failure to comply**

In case of failure or refusal on the part of any such carrier to keep such accounts, records, and memoranda

on the books and in the manner prescribed by the Commission, or to submit such accounts, records, memoranda, documents, papers, and correspondence as are kept to the inspection of the Commission or any of its authorized agents, such carrier shall forfeit to the United States the sum of $6,000 for each day of the continuance of each such offense.

**(e) False entry; destruction; penalty**

Any person who shall willfully make any false entry in the accounts of any book of accounts or in any record or memoranda kept by any such carrier, or who shall willfully destroy, mutilate, alter, or by any other means or device falsify any such account, record, or memoranda, or who shall willfully neglect or fail to make full, true, and correct entries in such accounts, records, or memoranda of all facts and transactions appertaining to the business of the carrier, shall be deemed guilty of a misdemeanor, and shall be subject, upon conviction, to a fine of not less than $1,000 nor more than $5,000 or imprisonment for a term of not less than one year nor more than three years, or both such fine and imprisonment: *Provided,* That the Commission may in its discretion issue orders specifying such operating, accounting, or financial papers, records, books, blanks, or documents which may, after a reasonable time, be destroyed, and prescribing the length of time such books, papers, or documents shall be preserved.

**(f) Confidentiality of information**

No member, officer, or employee of the Commission shall divulge any fact or information which may come to his knowledge during the course of examination of books or other accounts, as hereinbefore provided, except insofar as he may be directed by the Commission or by a court.

**(g) Use of other forms; alterations in prescribed forms**

After the Commission has prescribed the forms and manner of keeping of accounts, records, and memoranda

to be kept by any person as herein provided, it shall be unlawful for such person to keep any other accounts, records, or memoranda than those so prescribed or such as may be approved by the Commission or to keep the accounts in any other manner than that prescribed or approved by the Commission. Notice of alterations by the Commission in the required manner or form of keeping accounts shall be given to such persons by the Commission at least six months before the same are to take effect.

**(h) Exemption; regulation by State commission**

The Commission may classify carriers subject to this chapter and prescribe different requirements under this section for different classes of carriers, and may, if it deems such action consistent with the public interest, except the carriers of any particular class or classes in any State from any of the requirements under this section in cases where such carriers are subject to State commission regulation with respect to matters to which this section relates.

**(i) Consultation with State commissions**

The Commission, before prescribing any requirements as to accounts, records, or memoranda, shall notify each State commission having jurisdiction with respect to any carrier involved, and shall give reasonable opportunity to each such commission to present its views, and shall receive and consider such views and recommendations.

**(j) Report to Congress on need for further legislation**

The Commission shall investigate and report to Congress as to the need for legislation to define further or harmonize the powers of the Commission and of State commissions with respect to matters to which this section relates.

* * * *

## § 225. Telecommunications services for hearing-impaired and speech-impaired individuals

### (a) Definitions

As used in this section—

#### (1) Common carrier or carrier

The term "common carrier" or "carrier" includes any common carrier engaged in interstate communication by wire or radio as defined in section 153 of this title and any common carrier engaged in intrastate communication by wire or radio, notwithstanding sections 152(b) and 221(b) of this title.

#### (2) TDD

The term "TDD" means a Telecommunications Device for the Deaf, which is a machine that employs graphic communication in the transmission of coded signals through a wire or radio communication system.

#### (3) Telecomunications relay services

The term "telecommunications relay services" means telephone transmission services that provide the ability for an individual who has a hearing impairment or speech impairment to engage in communication by wire or radio with a hearing individual in a manner that is functionally equivalent to the ability of an individual who does not have a hearing impairment or speech impairment to communicate using voice communication services by wire or radio. Such term includes services that enable two-way communication between an individual who uses a TDD or other nonvoice terminal device and an individual who does not use such a device.

**(b) Availability of telecommunications relay services**

**(1) In general**

In order to carry out the purposes established under section 151 of this title, to make available to all individuals in the United States a rapid, efficient nationwide communication service, and to increase the utility of the telephone system of the Nation, the Commission shall ensure that interstate and intrastate telecommunications relay services are available, to the extent possible and in the most efficient manner, to hearing-impaired and speech-impaired individuals in the United States.

**(2) Use of general authority and remedies**

For the purposes of administering and enforcing the provisions of this section and the regulations prescribed thereunder, the Commission shall have the same authority, power, and functions with respect to common carriers engaged in intrastate communication as the Commission has in administering and enforcing the provisions of this title with respect to any common carrier engaged in interstate communication. Any violation of this section by any common carrier engaged in intrastate communication shall be subject to the same remedies, penalties, and procedures as are applicable to a violation of this chapter by a common carrier engaged in interstate communication.

**(c) Provision of services**

Each common carrier providing telephone voice transmission services shall, not later than 3 years after July 26, 1990, provide in compliance with the regulations prescribed under this section, throughout the area in which it offers service, telecommunications relay services, individually, through designees, through a competitively se-

lected vendor, or in concert with other carriers. A common carrier shall be considered to be in compliance with such regulations—

**(1)** with respect to intrastate telecommunications relay services in any State that does not have a certified program under subsection (f) of this section and with respect to interstate telecommunications relay services, if such common carrier (or other entity through which the carrier is providing such relay services) is in compliance with the Commission's regulations under subsection (d) of this section; or

**(2)** with respect to intrastate telecommunications relay services in any State that has a certified program under subsection (f) of this section for such State, if such common carrier (or other entity through which the carrier is providing such relay services) is in compliance with the program certified under subsection (f) of this section for such State.

**(d) Regulations**

**(1) In general**

The Commission shall, not later than 1 year after July 26, 1990, prescribe regulations to implement this section, including regulations that—

**(A)** establish functional requirements, guidelines, and operations procedures for telecommunications relay services;

**(B)** establish minimum standards that shall be met in carrying out subsection (c) of this section;

**(C)** require that telecommunications relay services operate every day for 24 hours per day;

**(D)** require that users of telcommunications relay services pay rates no greater than the rates

paid for functionally equivalent voice communication services with respect to such factors as the duration of the call, the time of day, and the distance from point of origination to point of termination;

**(E)** prohibit relay operators from failing to fulfill the obligations of common carriers by refusing calls or limiting the length of calls that use telecommunications relay services;

**(F)** prohibit relay operators from disclosing the content of any relayed conversation and from keeping records of the content of any such conversation beyond the duration of the call; and

**(G)** prohibit relay operators from intentionally altering a relayed conversation.

**(2) Technology**

The Commission shall ensure that regulations prescribed to implement this section encourage, consistent with section 157(a) of this title, the use of existing technology and do not discourage or impair the development of improved technology.

**(3) Jurisdictional separation of costs**

**(A)** In general

Consistent with the provisions of section 410 of this title, the Commission shall prescribe regulations governing the jurisdictional separation of costs for the services provided pursuant to this section.

**(B)** Recovering costs

Such regulations shall generally provide that costs caused by interstate telecommunications relay services shall be recovered from all subscribers for every interstate service and costs

caused by intrastate telecommunications relay services shall be recovered from the intrastate jurisdiction. In a State that has a certified program under subsection (f) of this section, a State commission shall permit a common carrier to recover the costs incurred in providing intrastate telecommunications relay services by a method consistent with the requirements of this section.

**(e) Enforcement**

**(1)** In general

Subject to subsections (f) and (g) of this section, the Commission shall enforce this section.

**(2)** Complaint

The Commission shall resolve, by final order, a complaint alleging a violation of this section within 180 days after the date such complaint is filed.

**(f) Certification**

**(1) State documentation**

Any State desiring to establish a State program under this section shall submit documentation to the Commission that describes the program of such State for implementing intrastate telecommunications relay services and the procedures and remedies available for enforcing any requirements imposed by the State program.

**(2) Requirement for certification**

After review of such documentation, the Commission shall certify the State program if the Commission determines that—

**(A)** the program makes available to hearing-impaired and speech-impaired individuals, either

directly, through designees, through a competitively selected vendor, or through regulation of intrastate common carriers, intrastate telecommunications relay services in such State in a manner that meets or exceeds the requirements of regulations prescribed by the Commission under subsection (d) of this section; and

**(B)** the program makes available adequate procedures and remedies for enforcing the requirements of the State program.

**(3) Method of funding**

Except as provided in subsection (d) of this section, the Commission shall not refuse to certify a State program based solely on the method such State will implement for funding intrastate telecommunication relay services.

**(4) Suspension or revocation of certification**

The Commission may suspend or revoke such cerification if, after notice and opportunity for hearing, the Commission determines that such certification is no longer warranted. In a State whose program has been suspended or revoked, the Commission shall take such steps as may be necessary, consistent with this section, to ensure continuity of telecommunications relay services.

**(g) Complaint**

**(1) Referral of complaint**

If a complaint to the Commission alleges a violation of this section with respect to intrastate telecommunications relay services within a State and certification of the program of such State under subsection (f) of this section is in effect, the Commission shall refer such complaint to such State.

**(2) Jurisdiction of Commission**

After referring a complaint to a State under paragraph (1), the Commission shall exercise jurisdiction over such complaint only if—

**(A)** final action under such State program has not been taken on such complaint by such State—

(i) within 180 days after the complaint is filed with such State; or

(ii) within a shorter period as prescribed by the regulations of such State; or

**(B)** the Commission determines that such State program is no longer qualified for certification under subsection (f) of this section.

* * * *

## § 251. Interconnection

### (a) General duty of telecommunications carriers

Each telecommunications carrier has the duty—

(1) to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers; and

(2) not to install network features, functions, or capabilities that do not comply with the guidelines and standards established pursuant to section 255 or 256 of this title.

### (b) Obligations of all local exchange carriers

Each local exchange carrier has the following duties:

#### (1) Resale

The duty not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of its telecommunications services.

#### (2) Number portability

The duty to provide, to the extent technically feasible, number portability in accordance with requirements prescribed by the Commission.

#### (3) Dialing parity

The duty to provide dialing parity to competing providers of telephone exchange service and telephone toll service, and the duty to permit all such providers to have nondiscriminatory access to telephone numbers, operator services, directory assistance, and directory listing, with no unreasonable dialing delays.

#### (4) Access to rights-of-way

The duty to afford access to the poles, ducts, conduits, and rights-of-way of such carrier to competing providers

of telecommunications services on rates, terms, and conditions that are consistent with section 224 of this title.

**(5) Reciprocal compensation**

The duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications.

**(c) Additional obligations of incumbent local exchange carriers**

In addition to the duties contained in subsection (b) of this section, each incumbent local exchange carrier has the following duties:

**(1) Duty to negotiate**

The duty to negotiate in good faith in accordance with section 252 of this title the particular terms and conditions of agreements to fulfill the duties described in paragraphs (1) through (5) of subsection (b) of this section and this subsection. The requesting telecommunications carrier also has the duty to negotiate in good faith the terms and conditions of such agreements.

**(2) Interconnection**

The duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network—

**(A)** for the transmission and routing of telephone exchange service and exchange access;

**(B)** at any technically feasible point within the carrier's network;

**(C)** that is at least equal in quality to that provided by the local exchange carrier to itself or to any subsidiary, affiliate, or any other party to which the carrier provides interconnection; and

**(D)** on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, in accordance with the terms and conditions of the agreement and the requirements of this section and section 252 of this title.

**(3) Unbundled access**

The duty to provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, in accordance with the terms and conditions of the agreement and the requirements of this section and section 252 of this title. An incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service.

**(4) Resale**

The duty—

**(A)** to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers; and

**(B)** not to prohibit, and not to impose unreasonble or discriminatory conditions or limitations on, the resale of such telecommunications service, except that a State commission may, consistent with regulations prescribed by the Commission under this section, prohibit a reseller that obtains at wholesale rates a telecommunications service that is available at retail only to a category of subscribers from offering such service to a different category of subscribers.

**(5) Notice of changes**

The duty to provide reasonable public notice of changes in the information necessary for the transmission and rout-

ing of services using that local exchange carrier's facilities or networks, as well as of any other changes that would affect the interoperability of those facilities and networks.

**(6) Collocation**

The duty to provide, on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, for physical collocation of equipment necessary for interconnection or access to unbundled network elements at the premises of the local exchange carrier, except that the carrier may provide for virtual collocation if the local exchange carrier demonstrates to the State commission that physical collocation is not practical for technical reasons or because of space limitations.

**(d) Implementation**

**(1) In general**

Within 6 months after February 8, 1996, the Commission shall complete all actions necessary to establish regulations to implement the requirements of this section.

**(2) Access standards**

In determining what network elements should be made available for purposes of subsection (c)(3), the Commission shall consider, at a minimum, whether—

**(A)** access to such network elements as are proprietary in nature is necessary; and

**(B)** the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer.

**(3) Preservation of State access regulations**

In prescribing and enforcing regulations to implement the requirements of this section, the Commission shall not preclude the enforcement of any regulation, order, or policy of a State commission that—

**(A)** establishes access and interconnection obligation of local exchange carriers;

**(B)** is consistent with the requirements of this section; and

**(C)** does not substantially prevent implementation of the requirements of this section and the purposes of this part.

**(e) Numbering administration**

**(1) Commission authority and jurisdiction**

The Commission shall create or designate one or more impartial entities to administer telecommunications numbering and to make such numbers available on an equitable basis. The Commission shall have exclusive jurisdiction over those portions of the North American Numbering Plan that pertain to the United States. Nothing in this paragraph shall preclude the Commission from delegating to State commissions or other entities all or any portion of such jurisdiction.

**(2) Costs**

The cost of establishing telecommunications numbering administration arrangements and number portability shall be borne by all telecommunications carriers on a competitively neutral basis as determined by the Commission.

**(f) Exemptions, suspensions, and modifications**

**(1) Exemption for certain rural telephone companies**

**(A) Exemption**

Subsection (c) of this section shall not apply to a rural telephone company until (i) such company has received a bona fide request for interconnection, services, or network elements, and (ii) the State commission determines (under subparagraph (B)) that such request is not unduly economically burdensome, is technically feasible, and is consistent with section 254 of this title (other than subsections (b)(7) and (c)(1)(D) thereof).

**(B) State termination of exemption and implementation schedule**

The party making a bona fide request of a rural telephone company for interconnection, services, or network elements shall submit a notice of its request to the State commission. The State commission shall conduct an inquiry for the purpose of determining whether to terminate the exemption under subparagraph (A). Within 120 days after the State commission receives notice of the request, the State commission shall terminate the exemption if the request is not unduly economically burdensome, is technically feasible, and is consistent with section 254 of this title (other than subsections (b)(7) and (c)(1)(D) thereof). Upon termination of the exemption, a State commission shall establish an implementation schedule for compliance with the request that is consistent in time and manner with Commission regulations.

**(C) Limitation on exemption**

The exemption provided by this paragraph shall not apply with respect to a request under subsection (c) of this section, from a cable operator providing video programming, and seeking to provide any telecommunications service, in the area in which the rural telephone company provides video programming. The limitation contained in this subparagraph shall not apply to a rural telephone company that is providing video programming on February 8, 1996.

**(2) Suspensions and modifications for rural carriers**

A local exchange carrier with fewer than 2 percent of the Nation's subscriber lines installed in the aggregate nationwide may petition a State commission for a suspension or modification of the application of a requirement or requirements of subsection (b) or (c) of this section to telephone exchange service facilities specified in such petition. The State commission shall grant such petition to the extent that, and for such duration as, the State commission determines that such suspension or modification—

**(A) is necessary—**

(i) to avoid a significant adverse economic impact on users of telecommunications services generally;

(ii) to avoid imposing a requirement that is unduly economically burdensome; or

(iii) to avoid imposing a requirement that is technically infeasible; and

**(B)** is consistent with the public interest, convenience, and necessity.

The State commission shall act upon any petition filed under this paragraph within 180 days after receiving such petition. Pending such action, the State commission may suspend enforcement of the requirement or requirements to which the petition applies with respect to the petitioning carrier or carriers.

**(g) Continued enforcement of exchange access and interconnection requirements**

On and after February 8, 1996, each local exchange carrier, to the extent that it provides wireline services, shall provide exchange access, information access, and exchange services for such access to interexchange carriers and information service providers in accordance with the same equal access and nondiscriminatory interconnection restrictions and obligations (including receipt of compensation) that apply to such carrier on the date immediately preceding February 8, 1996 under any court order, consent decree, or regulation, order, or policy of the Commission, until such restrictions and obligations are explicitly superseded by regulations prescribed by the Commission after February 8, 1996. During the period beginning on February 8, 1996 and until such restrictions and obligations are so superseded, such restrictions and obligations shall be enforceable in the same manner as regulations of the Commission.

**(h) Definition of incumbent local exchange carrier**

**(1) Definition**

For purposes of this section, the term "incumbent local exchange carrier" means, with respect to an area, the local exchange carrier that—

**(A)** on February 8, 1996, provided telephone exchange service in such area; and

**(B)** (i) on February 8, 1996, was deemed to be a member of the exchange carrier association pursuant to section 69.601(b) of the Commission's regulations (47 C.F.R. 69.601(b)); or

(ii) is a person or entity that, on or after February 8, 1996, became a successor or assign of a member described in clause (i).

**(2) Treatment of comparable carriers as incumbents**

The Commission may, by rule, provide for the treatment of a local exchange carrier (or class or category thereof) as an incumbent local exchange carrier for purposes of this section if—

**(A)** such carrier occupies a position in the market for telephone exchange service within an area that is comparable to the position occupied by a carrier described in paragraph (1);

**(B)** such carrier has substantally replaced an incumbent local exchange carrier described in paragraph (1); and

**(C)** such treatment is consistent with the public interest, convenience, and necessity and the purposes of this section.

**(i) Savings provision**

Nothing in this section shall be construed to limit or otherwise affect the Commission's authority under section 201 of this title.

**§ 252. Procedures for negotiations, arbitration, and approval of agreements**

**(a) Agreements arrived at through negotiation**

**(1) Voluntary negotiations**

Upon receiving a request for interconnection, services, or network elements pursuant to section 251, an incumbent local exchange carrier may negotiate and enter into a binding agreement with the requesting telecommunications carrier or carriers without regard to the standards set forth in subsections (b) and (c) of section 251 of this title. The agreement shall include a detailed schedule of itemized charges for interconnection and each service or network element included in the agreement. The agreement, including any interconnection agreement negotiated before February 8, 1996, shall be submitted to the State commission under subsection (e) of this section.

**(2) Mediation**

Any party negotiating an agreement under this section may, at any point in the negotiation, ask a State commission to participate in the negotiation and to mediate any differences arising in the course of the negotiation.

**(b) Agreements arrived at through compulsory arbitration**

**(1) Arbitration**

During the period from the 135th to the 160th day (inclusive) after the date on which an incumbent local exchange carrier receives a request for negotiation under this section, the carrier or any other party to the negotiation may petition a State commission to arbitrate any open issues.

**(2) Duty of petitioner**

**(A) A party that petitions a State commission** under paragraph (1) shall, at the same time as it submits

the petition, provide the State commission all relevant documentation concerning—

(i) the unresolved issues;

(ii) the position of each of the parties with respect to those issues; and

(iii) any other issue discussed and resolved by the parties.

**(B)** A party petitioning a State commission under paragraph (1) shall provide a copy of the petition and any documentation to the other party or parties not later than the day on which the State commission receives the petition.

**(3) Opportunity to respond**

A non-petitioning party to a negotiation under this section may respond to the other party's petition and provide such additional information as it wishes within 25 days after the State commission receives the petition.

**(4) Action by State commission**

**(A)** The State commission shall limit its consideration of any petition under paragraph (1) (and any response thereto) to the issues set forth in the petition and in the response, if any, filed under paragraph (3).

**(B)** The State commission may require the petitioning party and the responding party to provide such information as may be necessary for the State commission to reach a decision on the unresolved issues. If any party refuses or fails unreasonably to respond on a timely basis to any reasonable request from the State commission, then the State commission may proceed on the basis of the best information available to it from whatever source derived.

**(C)** The State commission shall resolve each issue set forth in the petition and the response, if any, by imposing appropriate conditions as required to implement

subsection (c) of this section upon the parties to the agreement, and shall conclude the resolution of any unresolved issues not later than 9 months after the date on which the local exchange carrier received the request under this section.

**(5) Refusal to negotiate**

The refusal of any other party to the negotiation to participate further in the negotiations, to cooperate with the State commission in carrying out its function as an arbitrator, or to continue to negotiate in good faith in the presence, or with the assistance, of the State commission shall be considered a failure to negotiate in good faith.

**(c) Standards for arbitration**

In resolving by arbitration under subsection (b) of this section any open issues and imposing conditions upon the parties to the agreement, a State commission shall—

**(1)** ensure that such resolution and conditions meet the requirements of section 251 of this title, including the regulations prescribed by the Commission pursuant to section 251 of this title;

**(2)** establish any rates for interconnection services, or network elements according to subsection (d) of this section; and

**(3)** provide a schedule for implementation of the terms and conditions by the parties to the agreement.

**(d) Pricing standards**

**(1) Interconnection and network element charges**

Determinations by a State commission of the just and reasonable rate for the interconnection of facilities and equipment for purposes of subsection (c)(2) of section 251 of this title, and the just and reasonable rate for network elements for purposes of subsection (c)(3) of such section—

**(A) shall be—**

(i) based on the cost (determined without reference to a rate-of-return or other rate-based proceeding) of providing the interconnection of network element (whichever is applicable), and

(ii) nondiscriminatory, and

**(B)** may include a reasonable profit.

**(2) Charges for transport and termination of traffic**

**(A) In general**

For the purposes of compliance by an incumbent local exchange carrier with section 251(b)(5) of this title, a State commission shall not consider the terms and conditions for reciprocal compensation to be just and reasonable unless—

(i) such terms and conditions provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier; and

(ii) such terms and conditions determine such costs on the basis of a reasonable approximation of the additional costs of terminating such calls.

**(B) Rules of construction**

This paragraph shall not be construed—

(i) to preclude arrangements that afford the mutual recovery of costs through the offsetting of reciprocal obligations, including arrangements that waive mutual recovery (such as bill-and-keep arrangements); or

(ii) to authorize the Commission or any State commission to engage in any rate regulation proceeding to establish with particularity the additional costs of transporting or terminating calls, or to require carriers to maintain records with respect to the additional costs of such calls.

**(3) Wholesale prices for telecommunications services**

For the purposes of section 251(c)(4) of this title, a State commission shall determine wholesale rates on the basis of retail rates charged to subscribers for the telecommunications service requested, excluding the portion thereof attributable to any marketing, billing, collection, and other costs that will be avoided by the local exchange carrier.

**(e) Approval by State commission**

**(1) Approval required**

Any interconnection agreement adopted by negotiation or arbitration shall be submitted for approval to the State commission. A State commission to which an agreement is submitted shall approve or reject the agreement, with written findings as to any deficiencies.

**(2) Grounds for rejection**

The State commission may only reject—

**(A)** an agreement (or any portion thereof) adopted by negotiation under subsection (a) of this section if it finds that—

(i) the agreement (or portion thereof) discriminates against a telecommunications carrier not a party to the agreement; or

(ii) the implementation of such agreement or portion is not consistent with the public interest, convenience, and necessity; or

**(B)** an agreement (or any portion thereof) adopted by arbitration under subsection (b) of this section if it finds that the agreement does not meet the requirements of section 251 of this title, including the regulations prescribed by the Commission pursuant to section 251 of this title, or the standards set forth in subsection (d) of this section.

**(3) Preservation of authority**

Notwithstanding paragraph (2), but subject to section 253 of this title nothing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of an agreement, including requiring compliance with intrastate telecommunications service quality standards or requirements.

**(4) Schedule for decision**

If the State commission does not act to approve or reject the agreement within 90 days after submission by the parties of an agreement adopted by negotiation under subsection (a) of this section, or within 30 days after submission by the parties of an agreement adopted by arbitration under subsection (b) of this section, the agreement shall be deemed approved. No State court shall have jurisdiction to review the action of a State commission in approving or rejecting an agreement under this section.

**(5) Commission to act if State will not act**

If a State commission fails to act to carry out its responsibility under this section in any proceeding or other matter under this section, then the Commission shall issue an order preempting the State commission's jurisdiction of that proceeding or matter within 90 days after being notified (or taking notice) of such failure, and shall assume the responsibility of the State commission under this section with respect to the proceeding or matter and act for the State commission.

**(6) Review of State commission actions**

In a case in which a State fails to act as described in paragraph (5), the proceeding by the Commission under such paragraph and any judicial review of the Commission's actions shall be the exclusive remedies for a State commission's failure to act. In any case in which a State commission makes a determination under this section, any

party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 of this title and this section.

**(f) Statements of generally available terms**

**(1) In general**

A Bell operating company may prepare and file with a State commission a statement of the terms and conditions that such company generally offers within that State to comply with the requirements of section 251 of this title and the regulations thereunder and the standards applicable under this section.

**(2) State commission review**

A State commission may not approve such statement unless such statement complies with subsection (d) of this section and section 251 of this title and the regulations thereunder. Except as provided in section 253 of this title nothing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of such statement, including requiring compliance with intrastate telecommiunications service quality standards or requirements.

**(3) Schedule for review**

The State commission to which a statement is submitted shall, not later than 60 days after the date of such submission—

**(A)** complete the review of such statement under paragraph (2) (including any reconsideration thereof), unless the submitting carrier agrees to an extension of the period for such review; or

**(B)** permit such statement to take effect.

**(4) Authority to continue review**

Paragraph (3) shall not preclude the State commission from continuing to review a statement that has been permitted to take effect under subparagraph (B) of such paragraph or from approving or disapproving such statement under paragraph (2).

**(5) Duty to negotiate not affected**

The submission or approval of a statement under this subsection shall not relieve a Bell operating company of its duty to negotiate the terms and conditions of an agreement under section 251 of this title.

**(g) Consolidation of State proceedings**

Where not inconsistent with the requirements of this chapter a State commission may, to the extent practical, consolidate proceedings under sections 214(e), 251(f), and 253, of this title, and this section in order to reduce administrative burdens on telecommunications carriers, other parties to the proceedings, and the State commission in carrying out its responsibilities under this chapter.

**(h) Filing required**

A State commission shall make a copy of each agreement approved under subsection (e) of this section and each statement approved under subsection (f) of this section available for public inspection and copying within 10 days after the agreement or statement is approved. The State commission may charge a reasonable and nondiscriminatory fee to the parties to the agreement or to the party filing the statement to cover the costs of approving and filing such agreement or statement.

**(i) Availability to other telecommunications carriers**

A local exchange carrier shall make available any interconnection, service, or network element provided under an

agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement.

**(j) Definition of incumbent local exchange carrier**

For purposes of this section, the term "incumbent local exchange carrier" has the meaning provided in section 251(h) of this title.

## § 253. Removal of barriers to entry

### (a) In general

No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.

### (b) State regulatory authority

Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254 of this section, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.

### (c) State and local government authority

Nothing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government.

### (d) Preemption

If, after notice and an opportunity for public comment, the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a) or (b) of this section, the Commission shall preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency.

**(e) Commercial mobile service providers**

Nothing in this section shall affect the application of section 332(c)(3) of this title to commercial mobile service providers.

**(f) Rural markets**

It shall not be a violation of this section for a State to require a telecommunications carrier that seeks to provide telephone exchange service or exchange access in a service area served by a rural telephone company to meet the requirements in section 214(e)(1) of this title for designation as an eligible telecommunications carrier for that area before being permitted to provide such service. This subsection shall not apply—

**(1)** to a service area served by a rural telephone company that has obtained an exemption, suspension, or modification of section 251(c)(4) of this title that effectively prevents a competitor from meeting the requirements of section 214(e)(1) of this title; and

**(2)** to a provider of commercial mobile services.

## § 254. Universal service

### (a) Procedures to review universal service requirements

#### (1) Federal-State Joint Board on universal service

Within one month after February 8, 1996, the Commission shall institute and refer to a Federal-State Joint Board under section 410(c) of this title a proceeding to recommend changes to any of its regulations in order to implement sections 214(e) of this title and this section, including the definition of the services that are supported by Federal universal service support mechanisms and a specific timetable for completion of such recommendations. In addition to the members of the Joint Board required under section 410(c) of the title, one member of such Joint Board shall be a State-appointed utility consumer advocate nominated by a national organization of State utility consumer advocates. The Joint Board shall, after notice and opportunity for public comment, make its recommendations to the Commission 9 months after February 8, 1996.

#### (2) Commission action

The Commission shall initiate a single proceeding to implement the recommendations from the Joint Board required by paragraph (1) and shall complete such proceeding within 15 months after February 8, 1996. The rules established by such proceeding shall include a definition of the services that are supported by Federal universal service support mechanisms and a specific timetable for implementation. Thereafter, the Commission shall complete any proceeding to implement subsequent recommendations from any Joint Board on universal service within one year after receiving such recommendations.

### (b) Universal service principles

The Joint Board and the Commission shall base policies for the preservation and advancement of universal service on the following principles:

**(1) Quality and rates**

Quality services should be available at just, reasonable, and affordable rates.

**(2) Access to advanced services**

Access to advanced telecommunications and information services should be provided in all regions of the Nation.

**(3) Access in rural and high cost areas**

Consumers in all regions of the Nation, including low-income consumers and those in rural, insular, and high cost areas, should have access to telecommunications and information services, including interexchange services and advanced telecommunications and information services, that are reasonably comparable to those services provided in urban areas and that are available at rates that are reasonably comparable to rates charged for similar services in urban areas.

**(4) Equitable and nondiscriminatory contribution**

All providers of telecommunications services should make an equitable and nondiscriminatory contribution to the preservation and advancement of universal service.

**(5) Specific and predictable support mechanisms**

There should be specific, predictable and sufficient Federal and State mechanisms to preserve and advance universal service.

**(6) Access to advanced telecommunications services for schools, health care, and libraries**

Elementary and secondary schools and classrooms, health care providers, and libraries should have access to advanced telecommunications services as described in subsection (h) of this section.

**(7) Additional principles**

Such other principles as the Joint Board and the Commission determine are necessary and appropriate for the protection of the public interest, convenience, and necessity and are consistent with this chapter.

**(c) Definition**

**(1) In general**

Universal service is an evolving level of telecommunications services that the Commission shall establish periodically under this section, taking into account advances in telecommunications and information technologies and services. The Joint Board in recommending, and the Commission in establishing, the definition of the services that are supported by Federal universal service support mechanisms shall consider the extent to which such telecommunications services—

**(A)** are essential to education, public health, or public safety;

**(B)** have, through the operation of market choices by customers, been subscribed to by a substantial majority of residential customers;

**(C)** are being deployed in public telecommunications networks by telecommunications carriers; and

**(D)** are consistent with the public interest convenience, and necessity.

**(2) Alterations and modifications**

The Joint Board may, from time to time, recommend to the Commission modifications in the definition of the services that are supported by Federal universal service support mechanisms.

**(3) Special services**

In addition to the services included in the definition of universal service under paragraph (1), the Commission

may designate additional services for such support mechanisms for schools, libraries, and health care providers for the purposes of subsection (h) of this section.

**(d) Telecommunications carrier contribution**

Every telecommunications carrier that provides interstate telecommunications services shall contribute, on an equitable and nondiscriminatory basis, to the specific, predictable, and sufficient mechanisms established by the Commission to preserve and advance universal service. The Commission may exempt a carrier or class of carriers from this requirement if the carrier's telecommunications activities are limited to such an extent that the level of such carrier's contribution to the preservation and advancement of universal service would be de minimis. Any other provider of interstate telecommunications may be required to contribute to the preservation and advancement of universal service if the public interest so requires.

**(e) Universal service support**

After the date on which Commission regulations implementing this section take effect, only an eligible telecommunications carrier designated under section 214(e) of this title shall be eligible to receive specific Federal universal service support. A carrier that receives such support shall use that support only for the provision, maintenance, and upgrading of facilities and services for which the support is intended. Any such support should be explicit and sufficient to achieve the purposes of this section.

**(f) State authority**

A State may adopt regulations not inconsistent with the Commission's rules to preserve and advance universal service. Every telecommunications carrier that provides intrastate telecommunications services shall contribute, on an equitable and nondiscriminatory basis, in a manner determined by the State to the preservation and advance-

ment of universal service in that State. A State may adopt regulations to provide for additional definitions and standards to preserve and advance universal service within that State only to the extent that such regulations adopt additional specific, predictable, and sufficient mechanisms to support such definitions or standards that do not rely on or burden Federal universal service support mechanisms.

**(g) Interexchange and interstate services**

Within 6 months after February 8, 1996, the Commission shall adopt rules to require that the rates charged by providers of interexchange telecommunications services to subscribers in rural and high cost areas shall be no higher than the rates charged by each such provider to its subscribers in urban areas. Such rules shall also require that a provider of interstate interexchange telecommunications services shall provide such services to its subscribers in each State at rates no higher than the rates charged to its subscribers in any other State.

**(h) Telecommunications services for certain providers**

**(1) In general**

**(A) Health care providers for rural areas**

A telecommunications carrier shall, upon receiving a bona fide request, provide telecommunications services which are necessary for the provision of health care services in a State, including instruction relating to such services, to any public or nonprofit health care provider that serves persons who reside in rural areas in that State at rates that are reasonably comparable to rates charged for similar services in urban areas in that State. A telecommunications carrier providing service under this paragraph shall be entitled to have an amount equal to the difference, if any, between the rates for services provided

to health care providers for rural areas in a State and the rates for similar services provided to other customers in comparable rural areas in that State treated as a service obligation as a part of its obligation to participate in the mechanisms to preserve and advance universal service.

**(B) Educational providers and libraries**

All telecomunications carriers serving a geographic area shall, upon a bona fide request for any of its services that are within the definition of universal service under subsection (c)(3) of this section, provide such services to elementary schools, secondary schools, and libraries for educational purposes at rates less than the amounts charged for similar services to other parties. The discount shall be an amount that the Commission, with respect to interstate services, and the States, with respect to intrastate services, determine is appropriate and necessary to ensure affordable access to and use of such services by such entities. A telecommunications carrier providing service under this paragraph shall

(i) have an amount equal to the amount of the discount treated as an offset to its obligation to contribute to the mechanisms to preserve and advance universal service, or

(ii) notwithstanding the provisions of subsection (e) of this section, receive reimbursement utilizing the support mechanisms to preserve and advance universal service.

**(2) Advanced services**

The Commission shall establish competitively neutral rules—

**(A)** to enhance, to the extent technically feasible and economically reasonable, access to advanced telecommunications and information services for all public and nonprofit elementary and secondary school classrooms, health care providers, and libraries; and

**(B)** to define the circumstances under which a telecommunications carrier may be required to connect its network to such public institutional telecommunications users.

**(3) Terms and conditions**

Telecommunications services and network capacity provided to a public institutional telecommunications user under this subsection may not be sold, resold, or otherwise transferred by such user in consideration for money or any other thing of value.

**(4) Eligibility of users**

No entity listed in this subsection shall be entitled to preferential rates or treatment as required by this subsection, if such entity operates as a for-profit business, is a school described in paragraph (5)(A) with an endowment of more than $50,000,000, or is a library or library consortium not eligible for assistance from a State library administrative agency under the Library Services and Technology Act [20 U.S.C.A. § 9121 *et seq.*].

**(5) Definitions**

For purposes of this subsection:

**(A) Elementary and secondary schools**

The term "elementary and secondary schools" means elementary schools and secondary schools, as defined in paragraphs (14) and (25), respectively, of section 8801 of Title 20.

**(B) Health care provider**

The term "health care provider" means—

(i) post-secondary educational institutions offering health care instruction, teaching hospitals, and medical schools;

(ii) community health centers or health centers providing health care to migrants;

(iii) local health departments or agencies;

(iv) community mental health centers;

(v) not-for-profit hospitals;

(vi) rural health clinics; and

(vii) consortia of health care providers consisting of one or more entities described in clauses (i) through (vi).

**(C) Public institutional telecommunications user**

The term "public institutional telecommunications user" means an elementary or secondary school, a library, or a health care provider as those terms are defined in this paragraph.

**(i) Consumer protection**

The Commission and the States should ensure that universal service is available at rates that are just, reasonable, and affordable.

**(j) Lifetime Assistance**

Nothing in this section shall affect the collection, distribution, or administration of the Lifeline Assistance Program provided for by the Commission under regulations set forth in section 69.117 of title 47, Code of Federal Regulations, and other related sections of such title.

**(k) Subsidy of competitive services prohibited**

A telecommunications carrier may not use services that are not competitive to subsidize services that are subject to competition. The Commission, with respect to interstate services, and the States, with respect to intrastate services, shall establish any necessary cost allocation rules, accounting safeguards, and guidelines to ensure that services included in the definition of universal service bear no more than a reasonable share of the joint and common costs of facilities used to provide those services.

* * * *

## § 261. Effect on other requirements

### (a) Commission regulations

Nothing in this part shall be construed to prohibit the Commission from enforcing regulations prescribed prior to February 8, 1996, in fulfilling the requirements of this part, to the extent that such regulations are not inconsistent with the provisions of this part.

### (b) Existing State regulations

Nothing in this part shall be construed to prohibit any State commission from enforcing regulations prescribed prior to February 8, 1996, or from prescribing regulations after such date of enactment, in fulfilling the requirements of this part, if such regulations are not inconsistent with the provisions of this part.

### (c) Additional State requirements

Nothing in this part precludes a State from imposing requirements on a telecommunications carrier for intrastate services that are necessary to further competition in the provision of telephone exchange service or exchange access, as long as the State's requirements are not inconsistent with this part or the Commission's regulations to implement this part.

* * * *

## § 271. Bell operating company entry into interLATA services

### (a) General limitation

Neither a Bell operating company, nor any affiliate of a Bell operating company, may provide interLATA services except as provided in this section.

### (b) InterLATA services to which this section applies

#### (1) In-region services

Bell operating company, or any affiliate of that Bell operating company, may provide interLATA services originating in any of its in-region States (as defined in subsection (i) of this section) if the Commission approves the application of such company for such State under subsection (d)(3) of this section.

#### (2) Out-of-region services

A Bell operating company, or any affiliate of that Bell operating company, may provide interLATA services originating outside its in-region States after February 8, 1996, subject to subsection (j) of this section.

#### (3) Incidental interLATA services

A Bell operating company, or any affiliate of a Bell operating company, may provide incidental interLATA services (as defined in subsection (g) of this section) originating in any State after February 8, 1996.

#### (4) Termination

Nothing in this section prohibits a Bell operating company or any of its affiliates from providing termi-

nation for interLATA services, subject to subsection (j) of this section.

**(c) Requirements for providing certain in-region interLATA services**

**(1) Agreement or statement**

A Bell operating company meets the requirements of this paragraph if it meets the requirements of subparagraph (A) or subparagraph (B) of this paragraph for each State for which the authorization is sought.

**(A) Presence of a facilities-based competitor**

A Bell operating company meets the requirements of this subparagraph if it has entered into one or more binding agreements that have been approved under section 252 of this title specifying the terms and conditions under which the Bell operating company is providing access and interconnection to its network facilities for the network facilities of one or more unaffiliated competing providers of telephone exchange service (as defined in section 153(47)(A) of this title, but excluding exchange access) to residential and business subscribers. For the purpose of this subparagraph, such telephone exchange service may be offered by such competing providers either exclusively over their own telephone exchange service facilities or predominantly over their own telephone exchange service facilities in combination with the resale of the telecommunications services of another carrier. For the purpose of this subparagraph, services provided pursuant to subpart K of part 22 of the Commission's regulations (47 C.F.R. 22.901 *et seq.*) shall not be considered to be telephone exchange services.

**(B) Failure to request access**

A Bell operating company meets the requirements of this subparagraph if, after 10 months after February 8, 1996, no such provider has requested the access and interconnection described in subparagraph (A) before the date which is 3 months before the date the company makes its application under subsection (d)(1) of this section, and a statement of the terms and conditions that the company generally offers to provide such access and interconnection has been approved or permitted to take effect by the State commission under section 252(f) of this title. For purposes of this subparagraph, a Bell operating company shall be considered not to have received any request for access and interconnection if the State commission of such State certifies that the only provider or providers making such a request have (i) failed to negotiate in good faith as required by section 252 of this title, or (ii) violated the terms of an agreement approved under section 252 of this title by the provider's failure to comply, within a reasonable period of time, with the implementation schedule contained in such agreement.

**(2) Specific interconnection requirements**

**(A) Agreement required**

A Bell operating company meets the requirements of this paragraph if, within the State for which the authorization is sought—

(i)(I) such company is providing access and interconnection pursuant to one or more agreements described in paragraph (1)(A), or

(II) such company is generally offering access and interconnection pursuant to a

statement described in paragraph (1)(B), and

(ii) such access and interconnection meets the requirements of subparagraph (B) of this paragraph.

**(B) Competitive checklist**

Access or interconnection provided or generally offered by a Bell operating company to other telecommunications carriers meets the requirements of this subparagraph if such access and interconnection includes each of the following:

(i) Interconnection in accordance with the requirements of sections 251(c)(2) and 252(d)(1) of this title.

(ii) Nondiscriminatory access to network elements in accordance with the requirements of sections 251(c)(3) and 252(d)(1) of this title.

(iii) Nondiscriminatory access to the poles, ducts, conduits, and rights-of-way owned or controlled by the Bell operating company at just and reasonable rates in accordance with the requirements of section 224 of this title.

(iv) Local loop transmission from the central office to the customer's premises, unbundled from local switching or other services.

(v) Local transport from the trunk side of a wireline local exchange carrier switch unbundled from switching or other services.

(vi) Local switching unbundled from transport, local loop transmission, or other services.

(vii) Nondiscriminatory access to—

(I) 911 and E911 services;

(II) directory assistance services to allow the other carrier's customers to obtain telephone numbers; and

(III) operator call completion services.

(viii) White pages directory listings for customers of the other carrier's telephone exchange service.

(ix) Until the date by which telecommunications numbering administration guidelines, plan, or rules are established, nondiscriminatory access to telephone numbers for assignment to the other carrier's telephone exchange service customers. After that date, compliance with such guidelines, plan, or rules.

(x) Nondiscriminatory access to databases and associated signaling necessary for call routing and completion.

(xi) Until the date by which the Commission issues regulations pursuant to section 251 of this title to require number portability, interim telecommunications number portability through remote call forwarding, direct inward dialing trunks, or other comparable arrangements, with as little impairment of functioning, quality, reliability, and convenience as possible. After that date, full compliance with such regulations.

(xii) Nondiscriminatory access to such services or information as are necessary to allow the requesting carrier to implement

local dialing parity in accordance with the requirements of section 251(b)(3) of this title.

(xiii) Reciprocal compensation arrangements in accordance with the requirements of section 252(d)(2) of this title.

(xiv) Telecommunications services are available for resale in accordance with the requirements of sections 251(c)(4) and 252(d)(3) of this title.

**(d) Administrative provisions**

**(1) Application to commission**

On and after February 8, 1996, a Bell operating company or its affiliate may apply to the Commission for authorization to provide interLATA services originating in any in-region State. The application shall identify each State for which the authorization is sought.

**(2) Consultation**

**(A) Consultation with the Attorney General**

The Commission shall notify the Attorney General promptly of any application under paragraph (1). Before making any determination under this subsection, the Commission shall consult with the Attorney General, and if the Attorney General submits any comments in writing, such comments shall be included in the record of the Commission's decision. In consulting with and submitting comments to the Commission under this paragraph, the Attorney General shall provide to the Commission an evaluation of the application using any standard the Attorney General considers appropriate. The Commission shall give substantial weight to the Attor-

ney General's evaluation, but such evaluation shall not have any preclusive effect on any Commission decision under paragraph (3).

**(B) Consultation with State commissions**

Before making any determination under this subsection, the Commission shall consult with the State commission of any State that is the subject of the application in order to verify the compliance of the Bell operating company with the requirements of subsection (c) of this section.

**(3) Determination**

Not later than 90 days after receiving an application under paragraph (1), the Commission shall issue a written determination approving or denying the authorization requested in the application for each State. The Commission shall not approve the authorization requested in an application submitted under paragraph (1) unless it finds that—

(A) the petitioning Bell operating company has met the requirements of subsection (c)(1) of this section and—

(i) with respect to access and interconnection provided pursuant to subsection (c)(1)(A) of this section, has fully implemented the competitive checklist in subsection (c)(2)(B) of this section; or

(ii) with respect to access and interconnection generally offered pursuant to a statement under subsection (c)(1)(B) of this section, such statement offers all of the items included in the competitive checklist in subsection (c)(2)(B) of this section;

(B) the requested authorization will be carried out in accordance with the requirements of section 272 of this title; and

(C) the requested authorization is consistent with the public interest, convenience, and necessity.

The Commission shall state the basis for its approval or denial of the application.

**(4) Limitation on Commission**

The Commission may not, by rule or otherwise, limit or extend the terms used in the competitive checklist set forth in subsection (c)(2)(B) of this section.

**(5) Publication**

Not later than 10 days after issuing a determination under paragraph (3), the Commission shall publish in the Federal Register a brief description of the determination.

**(6) Enforcement of conditions**

**(A) Commission authority**

If at any time after the approval of an application under paragraph (3), the Commission determines that a Bell operating company has ceased to meet any of the conditions required for such approval, the Commission may, after notice and opportunity for a hearing—

(i) issue an order to such company to correct the deficiency;

(ii) impose a penalty on such company pursuant to title V; or

(iii) suspend or revoke such approval.

**(B) Receipt and review of complaints**

The Commission shall establish procedures for the review of complaints concerning failures by Bell operating companies to meet conditions required for approval under paragraph (3). Unless the parties otherwise agree, the Commission shall act on such complaint within 90 days.

**(e) Limitations**

**(1) Joint marketing of local and long distance services**

Until a Bell operating company is authorized pursuant to subsection (d) of this section to provide interLATA services in an in-region State, or until 36 months have passed since February 8, 1996, whichever is earlier, a telecommunications carrier that serves greater than 5 percent of the Nation's presubscribed access lines may not jointly market in such State telephone exchange service obtained from such company pursuant to section 251(c)(4) of this title with interLATA services offered by that telecommunications carrier.

**(2) IntraLATA toll dialing parity**

**(A) Provision required**

A Bell operating company granted authority to provide interLATA services under subsection (d) of this section shall provide intraLATA toll dialing parity throughout that State coincident with its exercise of that authority.

**(B) Limitation**

Except for single-LATA States and States that have issued an order by December 19, 1995, requiring a Bell operating company to implement intraLATA toll dialing parity, a State may not require a Bell operating company to implement intraLATA toll dialing parity in that State

before a Bell operating company has been granted authority under this section to provide interLATA services originating in that State or before 3 years after February 8, 1996, whichever is earlier. Nothing in this subparagraph precludes a State from issuing an order requiring intraLATA toll dialing parity in that State prior to either such date so long as such order does not take effect until after the earlier of either such dates.

**(f) Exception for previously authorized activities**

Neither subsection (a) of this section nor section 273 of this title shall prohibit a Bell operating company or affiliate from engaging, at any time after February 8, 1996, in any activity to the extent authorized by, and subject to the terms and conditions contained in, an order entered by the United States District Court for the District of Columbia pursuant to section VII or VIII(C) of the AT&T Consent Decree if such order was entered on or before February 8, 1996, to the extent such order is not reversed or vacated on appeal. Nothing in this subsection shall be construed to limit, or to impose terms or conditions on, an activity in which a Bell operating company is otherwise authorized to engage under any other provision of this section.

**(g) Definition of incidental interLATA services**

For purposes of this section, the term "incidental interLATA services" means the interLATA provision by a Bell operating company or its affiliate—

**(1)**(A) of audio programming, video programming, or other programming services to subscribers to such services of such company or affiliate;

(B) of the capability for interaction by such subscribers to select or respond to such audio program-

ming, video programming, or other programming services;

(C) to distributors of audio programming or video programming that such company or affiliate owns or controls, or is licensed by the copyright owner of such programming (or by an assignee of such owner) to distribute; or

(D) of alarm monitoring services;

**(2)** of two-way interactive video services or Internet services over dedicated facilities to or for elementary and secondary schools as defined in section 254(h)(5) of this title;

**(3)** of commercial mobile services in accordance with section 332(c) of this title and with the regulations prescribed by the Commission pursuant to paragraph (8) of such section;

**(4)** of a service that permits a customer that is located in one LATA to retrieve stored information from, or file information for storage in, information storage facilities of such company that are located in another LATA;

**(5)** of signaling information used in connection with the provision of telephone exchange services or exchange access by a local exchange carrier; or

**(6)** of network control signaling information to, and receipt of such signaling information from, common carriers offering interLATA services at any location within the area in which such Bell operating company provides telephone exchange services or exchange access.

**(h) Limitations**

The provisions of subsection (g) of this section are intended to be narrowly constued. The interLATA services provided under subparagraph (A), (B), or (C) of sub-

section (g)(1) of this section are limited to those inter-LATA transmissions incidental to the provision by a Bell operating company or its affiliate of video, audio, and other programming services that the company or its affiliate is engaged in providing to the public. The Commission shall ensure that the provision of services authorized under subsection (g) of this section by a Bell operating company or its affiliate will not adversely affect telephone exchange service ratepayers or competition in any telecommunications market.

**(i) Additional definitions**

As used in this section—

**(1) In-region State**

The term "in-region State" means a State in which a Bell operating company or any of its affiliates was authorized to provide wireline telephone exchange service pursuant to the reorganization plan approved under the AT&T Consent Decree, as in effect on the day before February 8, 1996.

**(2) Audio programming services**

The term "audio programming services" means programming provided by, or generally considered to be comparable to programming provided by, a radio broadcast station.

**(3) Video programming services; other programming services**

The terms "video programming service" and "other programming services" have the same meanings as such terms have under section 522 of this title.

**(j) Certain service applications treated as in-region service applications**

For purposes of this section, a Bell operating company application to provide 800 service, private line service, or their equivalents that—

**(1)** terminate in an in-region State of that Bell operating company, and

**(2)** allow the called party to determine the inter-LATA carrier,

shall be considered an in-region service subject to the requirements of subsection (b)(1) of this section.

* * * *

## § 276. Provision of payphone service

### (a) Nondiscrimination safeguards

After the effective date of the rules prescribed pursuant to subsection (b) of this section, any Bell operating company that provides payphone service—

**(1)** shall not subsidize its payphone service directly or indirectly from its telephone exchange service operations or its exchange access operations; and

**(2)** shall not prefer or discriminate in favor of its payphone service.

### (b) Regulations

#### (1) Contents of regulations

In order to promote competition among payphone service providers and promote the widespread deployment of payphone services to the benefit of the general public, within 9 months after February 8, 1996, the Commission shall take all actions necessary (including any reconsideration) to prescribe regulations that—

(A) establish a per call compensation plan to ensure that all payphone service providers are fairly compensated for each and every completed intrastate and interstate call using their payphone, except that emergency calls and telecommunications relay service calls for hearing disabled individuals shall not be subject to such compensation;

(B) discontinue the intrastate and interstate carrier access charge payphone service elements and payments in effect on such date of enactment, and all intrastate and interstate payphone subsidies from basic exchange and exchange ac-

cess revenues, in favor of a compensation plan as specified in subparagraph (A);

(C) prescribe a set of nonstructural safeguards for Bell operating company payphone service to implement the provisions of paragraphs (1) and (2) of subsection (a) of this section, which safeguards shall, at a minimum, include the nonstructural safeguards equal to those adopted in the Computer Inquiry-III (CC Docket No. 90-623) proceeding;

(D) provide for Bell operating company payphone service providers to have the same right that independent payphone providers have to negotiate with the location provider on the location provider's selecting and contracting with, and, subject to the terms of any agreement with the location provider, to select and contract with, the carriers that carry interLATA calls from their payphones, unless the Commission determines in the rulemaking pursuant to this section that it is not in the public interest; and

(E) provide for all payphone service providers to have the right to negotiate with the location provider on the location provider's selecting and contracting with, and, subject to the terms of any agreement with the location provider, to select and contract with, the carriers that carry intraLATA calls from their payphones.

**(2) Public interest telephones**

In the rulemaking conducted pursuant to paragraph (1), the Commission shall determine whether public interest payphones, which are provided in the interest of public health, safety, and welfare, in locations where there would otherwise not be a payphone,

should be maintained, and if so, ensure that such public interest payphones are supported fairly and equitably.

**(3) Existing contracts**

Nothing in this section shall affect any existing contracts between location providers and payphone service providers or interLATA or intraLATA carriers that are in force and effect as of February 8, 1996.

**(c) State preemption**

To the extent that any State requirements are inconsistent with the Commission's regulations, the Commission's regulations on such matters shall preempt such State requirements.

**(d) Definition**

As used in this section, the term "payphone service" means the provision of public or semi-public pay telephones, the provision of inmate telephone service in correctional institutions, and any ancillary services.

## § 543. Regulation of rates

* * * *

### (b) Establishment of basic service tier rate regulations

#### (1) Commission obligation to subscribers

The Commission shall, by regulation, ensure that the rates for the basic service tier are reasonable. Such regulations shall be designed to achieve the goal of protecting subscribers of any cable system that is not subject to effective competition from rates for the basic service tier that exceed the rates that would be charged for the basic service tier if such cable system were subject to effective competition.

#### (2) Commission regulations

Within 180 days after October 5, 1992, the Commission shall prescribe, and periodically thereafter revise, regulations to carry out its obligations under paragraph (1). In prescribing such regulations, the Commission—

**(A)** shall seek to reduce the administrative burdens on subscribers, cable operators, franchising authorities, and the Commission;

**(B)** may adopt formulas or other mechanisms and procedures in complying with the requirements of subparagraph (A); and

**(C)** shall take into account the following factors:

(i) the rates for cable systems, if any, that are subject to effective competition;

(ii) the direct costs (if any) of obtaining, transmitting, and otherwise providing signals carried on the basic service tier, including signals and services carried on the

basic service tier pursuant to paragraph (7)(B), and changes in such costs;

(iii) only such portion of the joint and common costs (if any) of obtaining, transmitting, and otherwise providing such signals as is determined, in accordance with regulations prescribed by the Commission, to be reasonably and properly allocable to the basic service tier, and changes in such costs;

(iv) the revenues (if any) received by a cable operator from advertising from programming that is carried as part of the basic service tier or from other consideration obtained in connection with the basic service tier;

(v) the reasonably and properly allocable portion of any amount assessed as a franchise fee, tax, or charge of any kind imposed by any State or local authority on the transactions between cable operators and cable subscribers or any other fee, tax, or assessment of general applicability imposed by a governmental entity applied against cable operators or cable subscribers;

(vi) any amount required, in accordance with paragraph (4), to satisfy franchise requirements to support public, educational, or governmental channels or the use of such channels or any other services required under the franchise; and

(vii) a reasonable profit, as defined by the Commission consistent with the Commission's obligations to subscribers under paragraph (1).

**(3) Equipment**

The regulations prescribed by the Commission under this subsection shall include standards to establish, on the basis of actual cost, the price or rate for—

**(A)** installation and lease of the equipment used by subscribers to receive the basic service tier, including a converter box and a remote control unit and, if requested by the subscriber, such addressable converter box or other equipment as is required to access programming described in paragraph (8); and

**(B)** installation and monthly use of connections for additional television receivers.

**(4) Costs of franchise requirements**

The regulations prescribed by the Commission under this subsection shall include standards to identify costs attributable to satisfying franchise requirements to support public, educational, and governmental channels or the use of such channels or any other services required under the franchise.

**(5) Implementation and enforcement**

The regulations prescribed by the Commission under this subsection shall include additional standards, guidelines, and procedures concerning the implementation and enforcement of such regulations, which shall include—

**(A)** procedures by which cable operators may implement and franchising authorities may enforce the regulations prescribed by the Commission under this subsection;

**(B)** procedures for the expeditious resolution of disputes between cable operators and franchising authorities concerning the administration of such regulations;

**(C)** standards and procedures to prevent unreasonable charges for changes in the subscriber's selection of services or equipment subject to regulation under this section, which standards shall require that charges for changing the service tier selected shall be based on the cost of such change and shall not exceed nominal amounts when the system's configuration permits changes in service tier selection to be effected solely by coded entry on a computer terminal or by other similarly simple method; and

**(D)** standards and procedures to assure that subscribers receive notice of the availability of the basic service tier required under this section.

**(6) Notice**

The procedures prescribed by the Commission pursuant to paragraph (5)(A) shall require a cable operator to provide 30 days' advance notice to a franchising authority of any increase proposed in the price to be charged for the basic service tier.

**(7) Components of basic tier subject to rate regulation**

**(A) Minimum contents**

Each cable operator of a cable system shall provide its subscribers a separately available basic service tier to which subscription is required for access to any other tier of service. Such basic service tier shall, at a minimum, consist of the following:

(i) All signals carried in fulfillment of the requirements of sections 534 and 535 of this title.

(ii) Any public, educational, and governmental access programming required by

the franchise of the cable system to be provided to subscribers.

(iii) Any signal of any television broadcast station that is provided by the cable operator to any subscriber, except a signal which is secondarily transmitted by a satellite carrier beyond the local service area of such station.

**(B) Permitted additions to basic tier**

A cable operator may add additional video programming signals or services to the basic service tier. Any such additional signals or services provided on the basic service tier shall be provided by subscribers at rates determined under the regulations prescribed by the Commission under this subsection.

**(8) Buy-through of other tiers prohibited**

**(A) Prohibition**

A cable operator may not require the subscription to any tier other than the basic service tier required by paragraph (7) as a condition of access to video programming offered on a per channel or per program basis. A cable operator may not discriminate between subscribers to the basic service tier and other subscribers with regard to the rates charged for video programming offered on a per channel or per program basis.

**(B) Exception; limitation**

The prohibition in subparagraph (A) shall not apply to a cable system that, by reason of the lack of addressable converter boxes or other technological limitations, does not permit the operator to offer programming on a per channel

or per program basis in the same manner required by subparagraph (A). This subparagraph shall not be available to any cable operator after—

(i) the technology utilized by the cable system is modified or improved in a way that eliminates such technological limitation; or

(ii) 10 years after October 5, 1992, subject to subparagraph (C).

**(C) Waiver**

If, in any proceeding initiated at the request of any cable operator, the Commission determines that compliance with the requirements of subparagraph (A) would require the cable operator to increase its rates, the Commission may, to the extent consistent with the public interest, grant such cable operator a waiver from such requirements for such specified period as the Commission determines reasonable and appropriate.

**(c) Regulation of unreasonable rates**

**(1) Commission regulations**

Within 180 days after October 5, 1992, the Commission shall, by regulation, establish the following:

**(A)** criteria prescribed in accordance with paragraph (2) for identifying, in individual cases, rates for cable programming services that are unreasonable;

**(B)** fair and expeditious procedures for the receipt, consideration, and resolution of complaints from any franchising authority (in accordance with paragraph (3)) alleging that a rate for

cable programming services charged by a cable operator violates the criteria prescribed under subparagraph (A), which procedures shall include the minimum showing that shall be required for a complaint to obtain Commission consideration and resolution of whether the rate in question is unreasonable; and

**(C)** the procedures to be used to reduce rates for cable programming services that are determined by the Commission to be unreasonable and to refund such portion of the rates or charges that were paid by subscribers after the filing of the first complaint filed with the franchising authority under paragraph (3) and that are determined to be unreasonable.

**(2) Factors to be considered**

In establishing the criteria for determining in individual cases whether rates for cable programming services are unreasonable under paragraph (1)(A), the Commission shall consider, among other factors—

**(A)** the rates for similarly situated cable systems offering comparable cable programming services, taking into account similarities in facilities, regulatory and governmental costs, the number of subscribers, and other relevant factors;

**(B)** the rates for cable systems, if any, that are subject to effective competition;

**(C)** the history of the rates for cable programming services of the system, including the relationship of such rates to changes in general consumer prices;

**(D)** the rates, as a whole, for all the cable programming, cable equipment, and cable services provided by the system, other than program-

ming provided on a per channel or per program basis;

**(E)** capital and operating costs of the cable system, including the quality and costs of the customer service provided by the cable system; and

**(F)** the revenues (if any) received by a cable operator from advertising from programming that is carried as part of the service for which a rate is being established, and changes in such revenues, or from other consideration obtained in connection with the cable programming services concerned.

**(3) Review of rate changes**

The Commission shall review any complaint submitted by a franchising authority after February 8, 1996, concerning an increase in rates for cable programming services and issue a final order within 90 days after it receives such a complaint, unless the parties agree to extend the period for such review. A franchising authority may not file a complaint under this paragraph unless, within 90 days after such increase becomes effective it receives subscriber complaints.

**(4) Sunset of upper tier rate regulation**

This subsection shall not apply to cable programming services provided after March 31, 1999.

PUBLIC LAW 104-104; February 8, 1996

TELECOMMUNICATIONS ACT OF 1996

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TITLE VI—EFFECT ON OTHER LAWS

**§ 601. Applicability of Consent Decrees and Other Law.**

* * * *

**(c) Federal, State, and local law.—**

**(1) No implied effect.**—This Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided in such Act or amendments.